(16,844.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 276.

JOHN H. SCUDDER, ADMINISTRATOR OF THE ESTATE OF JOHN F. HOUDAYER, DECEASED, PLAINTIFF IN ERROR,

vs.

THE COMPTROLLER OF THE CITY AND COUNTY OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 28, 1898.

1 The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the surrogate of the county of New York, do find there remaining a certain record, and have compared the said notice of appeal, bond, papers, and order in the matter of the appraisal of the property of John F. Houdayer, deceased, under the act in relation to taxable transfers of property, with the originals thereof in this office, and have found the same are true and correct copies of such originals, and the same with the originals thereof are all the papers upon which said order was made and are in the words and figures following, to wit:

J. F. McL., Ap'l 7, '98.

New York Surrogate's Seal.

2 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the sixth day of October, in the year of our Lord one thousand eight hundred and ninety-six, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Remittitur, October 7th, 1896.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Be it remembered that on the thirteenth day of April, in the year of our Lord one thousand eight hundred and ninety-six, Ashbel P. Fitch, comptroller of the city and county of New York, the appellant in this action, came here into the court of appeals, by Emmett R. Olcott, his attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court of the first judicial department, and John H. Scudder, as administrator, &c., the respondent in said proceeding, afterwards appeared in said court of appeals by J. Culbert Palmer, his attorney.

Which said notice of appeal and the return filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Emmett R. Olcott, of counsel for the appel-
3 lant, and by Mr. J. Culbert Palmer, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court for the first judicial department, appealed from herein to this

court, be, and the same is hereby, reversed, and that the order of the surrogate be affirmed with costs; and it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the surrogate's court in the county of New York, there to be proceeded upon according to law.

Therefore it is considered that the said order be reversed and the order of the surrogate be affirmed with costs as aforesaid.

And thereupon as well *as* the notice of appeal and return thereto aforesaid by them given in the premises are by the said court of appeals remitted unto the surrogate's court in the county of New York, before the surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said surrogate's court before the surrogates thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *October 7th*, 1896.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] GORHAM PARKS, *Clerk.*

4 In the Court of Appeals.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Papers on appeal of comptroller of the city of New York from order of the supreme court, appellate division, first department, reversing order of surrogate of New York county fixing transfer tax on property of deceased.

Emmet R. Olcott, attorney for comptroller, appellant.
J. Culbert Palmer, attorney for administrator, respondent.

5 *Statement.*

In the Court of Appeals.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

This proceeding was begun on the 27th day of September, 1895, by the filing of a petition for the appointment of an appraiser, and an order making such appointment.

The names of the original parties to this proceeding are as follows: Ashbel P. Fitch, as comptroller of the city of New York.

John H. Scudder, as administrator of the goods, chattels and credits of John F. Houdayer, deceased.

Louise Houdayer, his widow.

Josephine Valliè, his niece, and

Angele Dubois, his niece.

There has been no change in the parties, all of whom appeared and are before the court.

The appeal is from an order of the appellate division, first department, reversing the order of the surrogate of the county of New York fixing a tax on the property of the decedent alleged to be within this State, under the act in relation to taxable transfers of property.

6 New York Supreme Court.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

SIRS: Please take notice that the comptroller of the city of New York hereby appeals to the court of appeals from the order made herein on the 10th day of April, 1896, reversing the order of the surrogate of the county of New York, made herein on the 21st day of January, 1896.

Dated New York, April 10, 1896.

Yours, &c., EMMET R. OLCOTT,
Attorney for the Appellant, 35 *Broadway, N. Y.*

To Henry D. Purroy, Esq., clerk, &c.; J. Culbert Palmer, Esq., attorney for administrator, respondent.

7 Surrogate's Court, New York County.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Tranfers of Property.

To the surrogate's court of the county of New York:

The petition of Ashbel P. Fitch respectfully shows:

I. That he is the comptroller of the city and county of New York.

Upon information and belief.

II. That on the 21st day of May, in the year 1895, the said decedent, then residing in the city of Trenton and State of New Jersey, was seized and possessed of property within the State of New York, subject to its laws, of the value of upwards of seventy thousand dollars, and that on the said 21st day of May, 1895, the said decedent departed this life intestate.

III. That such proceedings were had before the court of probate at the city of Trenton, New Jersey, that Louise Houdayer and John H. Scudder, both residents of such city of Trenton, were duly ap-

pointed administrators of the goods, chattels and credits of
8 the said decedent; that they duly qualified and are now acting as such.

IV. That no application has been made to any court in this State for letters of administration upon the estate of said decedent, nor has any last will been presented for probate.

V. That the said decedent died possessed of certain moneys on deposit in the city and county of New York, which are taxable under the transfer tax act of the State of New York.

VI. That the said administrators have endeavored to remove the estate of the said decedent within this State therefrom, without any appraisal for the payment of the tax fixed by law under the said transfer tax act, and without any application to the surrogate of this county for the appointment of an appraiser to appraise the property of the said decedent under the said transfer tax act.

VII. That under the provisions of the statute in regard to intestates of the State of New Jersey, where the said decedent was domiciled at the time of his death, the following persons are entitled to his property, that is to say:

Louise Houdayer, his widow.

Josephine Valliê, a niece.

Angele Dubois, a niece.

VIII. That such property of the said decedent, or some part thereof, is subject to the act in relation to taxable transfers of property.

IX. That all the persons who are interested in the said estate, and who are entitled to notice of all proceedings, including the comptroller of the city and county of New York, and their post-office addresses, are as follows:

Ashbel P. Fitch, comptroller, &c., 280 Broadway, New York, N. Y.

Louise Houdayer, Trenton, N. J.

9 John H. Scudder, *idem*.

Josephine Valliè, care of John H. Scudder, Trenton, N. J.

Angele Dubois, 375 Bank street, New York, N. Y.

Wherefore, your petitioner prays that you will appoint some competent person as appraiser as provided by law.

And your petitioner will ever pray, &c.,

ASHBEL P. FITCH, *Petitioner.*

(Verification.)

At a surrogate's court held in and for the county of New York, at the county court-house, in the city of New York, on the 27th September, 1895.

Present: Hon. John H. V. Arnold, surrogate.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

On reading and filing the petition of Ashbel P. Fitch, comptroller of the city and county of New York, praying for the appointment of some competent person as appraiser under and in pursuance of

the act in relation to taxable transfers of property, now, on, motion of Emmet R. Olcott, Esq., attorney and of counsel for the said petitioner, it is

Ordered that Gilbert W. Minor, Esq., be and he is, hereby appointed such appraiser; and it is further

10 Ordered that the said appraiser give the notice required by law (which notice shall be ten days), in the manner and at the time therein set forth, to the following persons and to all other persons known to have or claim an interest in the property of the decedent named in the above-entitled proceeding, that is to say:

Ashbel P. Fitch, comptroller, &c., 280 Broadway, New York, N. Y.
John H. Scudder, Trenton, N. J.
Louise Houdayer, Trenton, N. J.
John H. Scudder, *idem.*
Josephine Vallié, care of John H. Scudder, Trenton, N. J.
Angele Du Bois, 375 Bank street, New York, N. Y.

JOHN H. V. ARNOLD, *Surrogate.*

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the act in Relation to Taxable Transfers of Property, of the Property of JOHN F. HOUDAYER, Deceased.

You will please to take notice that, by virtue of an order of Hon John H. V. Arnold, one of the surrogates of the county of New York, made and dated the 27th day of September, 1895, and pursuant to provisions of chapter 399 of the Laws of 1892, entitled, "An act in relation to taxable transfers of property," I shall on the 16th day of Oct. 1895, at 11 o'clock in the forenoon of that day, at room

11 No. 12, Stewart building, No. 280 Broadway, in the city of New York, proceed to appraise at its fair market value all the property of said decedent, deceased, late of said city, passing by his last will and testament, or by the intestate laws of the State of New York, which is subject to the payment of the tax imposed by the said act.

And such of you as are hereby notified as are under the age of twenty-one years are required to appear by your guardian, if you have one, or if you have none, to appear and apply for one to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the surrogate to represent and act for you in the proceeding.

New York, Oct. 5, 1895.

GILBERT W. MINOR,
Appraiser, Room 87, *No.* 206 *Broadway, N. Y. City.*

To John H. Scudder.

Surrogate's Court, County of New York.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of JOHN F. HOUDAYER, Deceased.

You will please take notice that John H. Scudder, administrator of the goods and chattels which were of John F. Houdayer,
12 deceased, hereby appears in this action, and that I have been retained as attorney for him therein.

Dated New York, N. Y., October 11, 1895.

J. CULBERT PALMER,
Attorney for John H. Scudder, Administrator, &c.,
165 *Broadway, New York, N. Y.*

To Gilbert W. Minor, appraiser, 206 Broadway, New York city.

Service of a copy of the above notice of appearance this day admitted.

Oct. 11, 1895.

GILBERT W. MINOR, *Appraiser.*

Surrogate's Court, New York County.

In the Matter of the Appraisal, under the Act in Relation to Taxable Transfers of Property, of the Property of JOHN F. HOUDAYER, Deceased.

STATE OF NEW JERSEY, } *ss.:*
County of Mercer, }

John H. Scudder, being duly sworn, deposes and says that he resides in the city of Trenton, State of New Jersey; that on the 21st day of May, 1895, John F. Houdayer, a citizen of the State of New Jersey, died in the city of Trenton, which was the place
13 of his residence; that said John F. Houdayer left no last will and testament, and that on the sixth day of June, 1895, deponent and one Louise Houdayer (decedent's widow) duly qualified as administrators of decedent's estate before the court of probate of the city of Trenton, State of New Jersey, and that no administration has been applied for in the State of New York.

Deponent further says that said John F. Houdayer left him surviving his widow, Louise Houdayer, residing in the city of Trenton, State of New Jersey; Josephine Vallèi, a niece residing at La Mans Sarthe, France; and Angele Du Bois, a niece residing at No. 37 Bank street, New York city, his only heirs and next of kin.

Deponent further says that some time previous to decedent's death, decedent had been appointed by the terms of the last will and testament of Edmund Husson, deceased, trustee of certain trusts, created by said last will and testament; that on or about the first day of January, 1876, decedent opened an account in the Farmers' Loan and Trust Company of the City of New York, as trustee under the will of Edmund Husson, deceased, in which he, from time to time,

made deposits of funds belonging to said trust estate, and in which, as appears by the private books of decedent, he also, from time to time, made deposits of money belonging to himself individually; that said deposits were subject to sight draft; were frequently drawn on by cheque by decedent and were maintained constantly as an open running account from the date of the first deposit to the time of decedent's death; that at the time of decedent's death, the total amount of said deposit was seventy-three thousand and seven hundred and fifteen dollars ($73,715), of which there appeared by his said books of account, to have been deposited by said John F. Houdayer, individually, the sum of seventy-one thousand and seven hundred and fifteen dollars ($71,715.)

Deponent further says that some time after the death of said
14 decedent, and on the petition of the beneficiaries of the unexecuted trust created under and by virtue of the will of Edmund Husson, deceased, deponent was appointed by the supreme court of the State of New York, substituted trustee in the place of John F. Houdayer, deceased, to execute said unexecuted trust. Deponent thereby united in himself the offices of substituted trustee under the will of Edmund Husson, deceased, and of co-administrator of the estate of John F. Houdayer, deceased. Deponent further says that by reason of the double capacity in which he acted, as appears above, and of his intimate acquaintanceship with the business affairs of John F. Houdayer, deceased, and in consequence of the harmonious relations existing between the various *cestuis que trust* of the trust created by the last will and testament of Edmund Husson, deceased, the widow and next of kin of John F. Houdayer, deceased, no accounting was deemed necessary to be made to determine the proportions of the deposit in the Farmers' Loan & Trust Company, which should be credited to the trust estate and to the individual estate of the said John F. Houdayer, deceased, but that said deponent by and with the consent of all the parties interested, has charged to and paid from the estate of John F. Houdayer, the sum of two thousand dollars ($2,000), as the portion of said deposit due and owing by said estate to the trust estate created under the will of Edmund Husson, deceased, and as such co-administrator of said John F. Houdayer, deceased, has collected from said trust company the balance of deposit, to wit: the sum of seventy-one thousand seven hundred and fifteen dollars ($71,715), with the exception of about four thousand dollars ($4,000), left with said trust company, awaiting the decision of the courts in the matter of the levying of the tax under the transfer tax law.

Deponent further says that there was no other property or claim in this State to which decedent has any title. Deponent further says that decedent left an estate in the States of New Jersey, Kansas and Missouri, which, with the deposit in the city of New
15 York aforesaid, aggregated the sum of two hundred thousand dollars ($200,000.)

Deponent further says that the debts left by said John F. Houdayer, deceased, together with the expenses of administering his estate, will amount to about the sum of ten thousand dollars, ex-

clusive of the amount of the deposit hereinbefore referred to, which has been credited to the substituted trustee under the last will and testament of Edmund Husson, deceased, as aforesaid.

Deponent further says that he understands and believes that proceedings have been instituted by the authorities of the State of New York, to appraise for the purpose of levying a tax thereon, under the act in relation to taxable transfers of property in the State of New York, the property of decedent within the State of New York, in which he believes it is intended to include the amount on deposit in the Farmers' Loan & Trust Company, as aforesaid.

Deponent further says that he objects to such proceedings and opposes a levy of any such tax upon such amount so on deposit, and claims that said deposit is exempt under the laws, and not subject to taxation.

JOHN H. SCUDDER.

Sworn to before me this 24th day of October, 1895.
Witness my hand and seal.

JAMES S. AILKEN,
Notary Public.

(County clerk's certificate attached.)

16 Surrogate's Court, New York County.

In the Matter of the Appraisal, under the act Relating to Taxable Transfers of Property, of the Property of JOHN F. HOUDAYER, Deceased.

STATE OF NEW YORK, }
City and County of New York, } ss.:

John H. Scudder, being duly sworn, deposes and says that it is the intention of the administrators of the estate of John F. Houdayer, deceased, to pay all claims against said estate, together with the expenses of administering the same, from the fund created by collecting from the Farmers' Loan & Trust Company of the City of New York, the deposit therein standing in the name of the said John F. Houdayer, as trustee at the time of his decease, or from such portion of the same as they are entitled to claim as administrators of the said John F. Houdayer deceased.

Deponent further says that this affidavit is made as a part of and supplementary to the original affidavit made by him in the above matter.

JOHN H. SCUDDER.

Sworn to before me this 21st day of November, 1895.

HENRY A. RUBINO,
Notary Public, N. Y. Co., No. 85.

17 Surrogate's Court, New York County.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property. Died May 21st, 1895.

To the surrogate's court, county of New York:

I, the undersigned, who was, by an order made and entered on the 27th day of September, 1895, appointed appraiser under and in pursuance of the law in relation to taxable transfers of property, a certified copy of which order is hereto attached, respectfully report:

First. That forthwith, after my said appointment I duly took and subscribed the oath prescribed by statute, which said oath is hereto annexed.

Second. That thereafter, on the 5th day of October, 1895, I duly gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property of said John F. Houdayer, deceased, subject to the payment of the tax imposed by said law, including those named by the surrogate in the said order, of the time and place I would appraise the property of John F. Houdayer, deceased, subject to the payment of the said tax; a true copy of said notice, together with proof of mailing thereof, is also hereto attached.

Third. I further report that the following appearances were made before me in this proceeding: Emmet R. Olcott, Esq., for the comptroller; J. Culbert Palmer, Esq., for the administrator.

18 Fourth. I further report that the decedent died on the 21st of May, 1895.

Fifth. I further report that at the time and place in said notice stated, to wit, on the 16th day of October, 1895, at No. 280 Broadway, in the city of New York, and at other and subsequent times and at divers places, I appraised all the property, being personal property of the said John F. Houdayer, deceased, subject to the payment of said tax, at its fair market value, as follows, to wit:

Personal Estate within the State of New York.

On deposit in the Farmers' Loan & Trust Company of N. Y.	$71,715 00
From which I deduct:	
7/20, *pro rata* share of debts, including the expenses of administering the estate	3,500 00
Net personal estate in N. Y.	$68,215 00

Which sum, under the interstate laws, is divided as follows:

To Louise Houdayer, wife, ½ of net estate	$34,107 50
" Josephine Vallié, niece, ¼ of net estate	17,053 75
" Angele Du Bois, niece, ¼ of net estate	17,053 75

Dated New York, January 17th, 1896.

Respectfully submitted.

GILBERT W. MINOR, *Appraiser.*

19 At a surrogate's court held in and for the county of New York, at the county court-house in the city of New York, on the 17th day of January, 1896.

Present: Hon. Frank T. Fitzgerald, surrogate.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property. Died May 21st, 1895.

On reading and filing the report of the appraiser, Gilbert W. Minor, heretofore appointed herein, now, on motion of Emmet R. Olcott, Esq., attorney and of counsel for the comptroller, it is

Ordered, that the respective interests of the beneficiaries in the estate of the said decedent within the State of New York, and the tax to which the same is liable under the act in relation to taxable transfers of property, are hereby determined, fixed and assessed as follows:

Beneficiaries.	Interest.	Tax.
Louise Houdayer	$34,107 50	$341 07
Josephine Vallié.....	17,053 75	852 69
Angele Du Bois.....	17,053 75	852 68

FRANK T. FITZGERALD, *Surrogate.*

SIR: Please take notice that the within is a copy of the order fixing transfer tax in the within-entitled proceeding, entered
20 in the office of the clerk of the surrogate's court for the county of New York, on the 17th day of January, 1896.

Yours, etc.,
EMMET R. OLCOTT,
Att'y and of Counsel for the Comptroller.

To J. Culbert Palmer, Esq., attorney for administrator, 167 Broadway, N. Y.

Surrogate's Court, New York County.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Please take notice that John H. Scudder, administrator, &c., of the said decedent, hereby appeals to the surrogate of the county of New York from the order fixing a transfer tax herein and entered in the office of the said surrogate on the 17th day of January, 1896, on the ground that the deposit in the Farmers' Loan and Trust Company of $71,715, standing at the time of decedent's death in his name as trustee, was a chose in action belonging to a non-resident decedent, and not property within this State subject to taxation under the provisions of the act in relation to taxable transfers of property; that the situs of the claim of decedent against such deposit was at the domicile of the decedent and not at the domicile of the said depository, and such property being the property of
21 a non-resident decedent, and situated out of this State, the same does not fall within the purview of said act. Even if

regarded as property within this State, it is not taxable thereunder, because such property was only transiently within this State.

In any event the expenses of administering the estate should be deducted entirely from the amount of deposit.

Dated New York, January 18th, 1896.

Yours, &c.,
J. CULBERT PALMER,
Attorney for Administrator, 165 *Broadway, New York, N. Y.*

To J. Fairfax McLaughlin, Esq., clerk of the surrogate's court; Emmet R. Olcott, Esq., att'y and of counsel for the comptroller, 35 Broadway, N. Y. city.

At a surrogate's court, held in and for the county of New York, at the county court-house in the city of New York, on the 21st day of January, 1896.

Present: Hon. Frank T. Fitzgerald, surrogate.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in relation to Taxable Transfers of Property.

An appraiser having heretofore been duly appointed herein to assess and fix the cash value of the estate of the said decedent
22 subject to the provisions of the act in relation to taxable transfers of property, and the report of such appraiser having been duly made and filed, and an order having thereupon been duly entered and filed on the 17th day of January, 1896, fixing and determining the respective interests of the beneficiaries in the estate of said decedent, and the tax to which the same is liable, and John H. Scudder, administrator, &c., of said decedent having appealed to the surrogate from said order of January 17th, 1896, now on motion of Emmet R. Olcott, Esq., attorney and of counsel for the comptroller, and after hearing J. Culbert Palmer, Esq., attorney and of counsel for said John H. Scudder, administrator, &c., of said decedent.

It is ordered that the said order of the surrogate heretofore made herein on the 17th day of January, 1896, be and the same is hereby affirmed.

FRANK T. FITZGERALD, *Surrogate.*

No objection is made to the form of the foregoing order.

EMMET R. OLCOTT,
Att'y for Comptroller.
J. CULBERT PALMER,
Att'y for Admin.

Please take notice that the within is a true copy of an order affirming order this day duly entered in the office of the clerk of this court, in the city of New York.

Dated New York, January 21st, 1896.

EMMET R. OLCOTT,
Attorney and of Counsel for the Comptroller,
35 *Broadway, New York, N. Y.*

To J. Culbert Palmer, Esq., attorney for administrator, etc.

23 Surrogate's Court, New York County.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under an Act in Relation to Taxable Transfers of Property.

SIRS: Please take notice, that John H. Scudder, administrator, &c., of the said decedent hereby appeals to the appellate division of the supreme court from the order entered herein on the twenty-first day of January, 1896, which affirmed the order made on the seventeenth day of January, 1896, fixing the transfer tax due on the interests of the parties entitled to the estate of said decedent.

Dated New York city, January 22, 1896.

Yours, &c., J. CULBERT PALMER,
Att'y for John H. Scudder, as Administrator, &c.,
165 *Broadway, New York, N. Y.*

To J. Fairfax McLaughlin, Esq., clerk of the surrogate's court; Emmet R. Olcott, Esq., attorney and of counsel for the comptroller, 35 Broadway, New York, N. Y.

24 Supreme Court, Appellate Division, First Department.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

CITY AND COUNTY OF NEW YORK, *ss:*

J. Culbert Palmer, being duly sworn, says that he is the attorney for John H. Scudder, administrator, &c., and appellant in this proceeding.

That, as he is informed and believes, the report of the appraiser herein and the order confirming said report, and the order confirming the said order were made by his honor, Frank T. Fitzgerald, without handing down any written opinion, and that the appraiser herein rendered no other opinion than the said report.

J. CULBERT PALMER.

Sworn to before me this 25th day of January, 1896.

HENRY A. RUBINO,
Notary Public No. 85, *New York Co.*

25 Supreme Court, Appellate Division, First Department.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property. Appeal of the Administrator, &c.

It is hereby stipulated that the foregoing are correct copies of the notice of appeal herein to the appellate division, the order appealed from and of all the papers on which the court below acted in mak-

ing such order, on file in the office of the clerk of the surrogate of the county of New York.

Dated New York, January 25, 1896.

J. CULBERT PALMER,
Att'y for Administrator.
EMMET R. OLCOTT,
Att'y and of Counsel for the Comptroller.

26 At a term of the appellate division of the supreme court, held in and for the first department at the court-rooms, in the city of New York, on the 10th day of April, 1896.

Present: Hon. Charles H. Van Brunt, P. J.; Hon. George C. Barrett, Hon. William Rumsey, Hon. Morgan J. O'Brien, Hon. George L. Ingraham, JJ.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

The appeal of John H. Scudder, administrator of the goods, chattels and credits of John F. Houdayer, deceased, from the order of the surrogate of the county of New York, dated the 21st day of January, 1896, affirming the order herein dated the 17th day of January, 1896, coming on to be heard, and after hearing J. Culbert Palmer, Esq., of counsel for the appellant, and Emmet R. Olcott, Esq., of counsel for the respondent, and due deliberation having been had thereon; now, on motion of J. Culbert Palmer, Esq., attorney for the appellant,

It is ordered, that the said order of the surrogate of the county of New York, dated January 21, 1896, be and the same is hereby reversed, with costs to said appellant.

Enter.

C. H. V. B.

27 Supreme Court, Appellate Division, First Department.

Present: Hons. Charles H. Van Brunt, P. J.; George C. Barrett, William Rumsey, Morgan J. O'Brien and George L. Ingraham, JJ.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Appeal by John H. Scudder, administrator of the estate of John F. Houdayer, deceased, from order of the surrogate's court of New York, entered the 21st day of January, 1896, affirming an order of said court, entered the 17th day of January, 1896, fixing the transfer tax due upon the interests of the beneficiaries in the estate of the said decedent.

J. Culbert Palmer for the appellant.
Emmet R. Olcott for the comptroller, respondent.

BARRETT, *J.*:

The question here is, whether the balance due the decedent at the time of his death—resulting from deposits made by him individu-

ally in a trust account which, as trustee under the will of Edmund Husson, deceased, he had opened in the Farmers' Loan and
28 Trust Company of this city—was "property" of the decedent "within this State" within the meaning of the taxable transfers act (Laws of 1892, chapter 399, sec. 1, subd. 2). It is well settled that the legal relation which existed between the decedent, as such trustee, and the Farmers' Loan and Trust Company was that of debtor and creditor. The deposits became the property of the trust company, and thereupon the company became indebted to the depositor for the amount so deposited. Here, however, even this relation existed only between the decedent in his representative capacity (as trustee under the will of *of* Edward Husson) and the company. Individually he occupied no contract relation toward the company. His individual deposits simply went to swell the trust account. Ordinarily it would have required an accounting in equity to separate the individual from the trust deposits, and to appropriate the general bank balance in accordance with just principles. Here that separation was amicably arranged between the decedent's estate and the trust estate, but this was merely a friendly substitute for an accounting. Precisely what the decedent had individually within this State was the right to an accounting in equity with regard to a debt due by the company to himself as Husson's trustee. We do not think that the debt was property within this State within the meaning of the taxable transfers act. Much less was the right to an accounting with respect to such debt. It is provided by section 22 of the act in question, that the word property as used therein shall "include all property or interest therein, whether situated within or without the State, over which this State has any jurisdiction for the purpose of taxation." No more and no less. Not property generally, it will be observed. Not even property as defined by the statutory construction act passed later in the session of 1892; for much of what is within its definitions is property over which
29 the State cannot as against non-residents have any jurisdiction. Thus the act is in harmony with the authorities which hold that the power of taxation of a State is limited to persons, property and business within her jurisdiction (Foreign Bond case, 15 Wall., 300). This jurisdiction, however, is not what the State may choose to assert, but what, as matter of fact, it possesses. Here, for instance, this State has no jurisdiction over the person of the decedent. He was, in fact, a non-resident of this State. It does not appear that he transacted business within this State, so the jurisdiction upon that head was also lacking. The question remains as to his property. It was distinctly held in the Foreign Bond case (*supra*) that debts have no *situs* independent of the domicile of the creditor; and that such debts are the property of the creditor, and follow his domicile. It is of no moment in the application of this rule where the debtor resides or does business, or where he may be found. A debt can have no locality separate from the party to whom it is due. The debt there was evidenced by the bonds of a domestic corporation, but as such bonds were not within the taxing State, as in fact they were in the actual possession of the owner at his foreign domicile,

the Supreme Court of the United States held that the property evidenced thereby was not within the taxing State and was not taxable there.

Thus clearly this State has no jurisdiction, for the purposes of taxation, over the right in action here possessed by the decedent. It asserted no such jurisdiction in the act in question, nor could it have done so. Its jurisdiction, so far as non-resident decedents were concerned, was limited to property which had a visible and tangible existence. As to visible and tangible property, the fiction of a legal *situs* at the domicile of the owner gives way to the fact of the actual *situs*. With regard to choses in action, however, and intangible property generally, the legal *situs* is, to all intents and purposes, the actual *situs* (Hoyt *v.* Commissioners, 23 N. Y.,
30 224). The debtor is not the debt, and jurisdiction over the debtor is not, for the purposes of taxation, jurisdiction over his obligation. There is jurisdiction to attach, but not to tax, the debt. The right to attach proceeds upon the jurisdiction over the resident debtor. There is jurisdiction to compel such debtor to pay what he owes his creditor to the latter's creditor. In that case the attachment does not create the obligation. It enforces it. The tax, however, creates the liability, and also enforces it. That can only be done when the person or the property of the creditor is within the jurisdiction. The State cannot create a liability in its own favor against the non-resident creditor by the mere exercise of jurisdiction over the resident debtor. It can enforce an existing liability, but it cannot create one.

This rule is in entire harmony with that laid down in the Whiting case, lately decided by this appellate division (*N. Y. Law Journal*, March 30, 1896). The tax was there imposed upon corporate bonds which were not, as in the railroad bond case, in the actual possession of the decedent at his foreign domicile, but were in fact on deposit in a safe deposit company in this city. These bonds were essentially property. They were not, like shares of stock, mere evidences of an interest in the corporation. They were salable and repleviable as ordinary chattels. They required no written transfer to pass the title thereto.

The fiction of the legal *situs* might well give way with respect to coupon bonds, thus passing from hand to hand by delivery, the same as chattels generally. If such bonds are brought here for permanent safe keeping, they are not only within the jurisdiction of the State in a technical sense, but are within the principle upon which all taxation rests, namely, the protection of our laws, and the protection of the system inaugurated by those laws and guarded by its ministers. So far as the securities in that case were bonds
31 of the United States, another question arose, namely, whether as to a non-resident decedent the tax was to be treated strictly as a tax upon the right of succession. Of course, if it was in any just sense a tax upon property, the bonds of the United States were specially exempt. As to residents, the tax has been repeatedly held to be a tax upon the right of succession under a will, or by devolution, in cases of intestacy (Matter of Swift, 137 N. Y., 88; Matter of

Merriam, 141 N. Y., 484). This precise rule has never yet been extended in terms to non-resident decedents, and that question is an open one, unless, indeed, the general rule which the court of appeals laid down in the Swift and Merriam cases was intended to cover non-resident as well as resident decedents. There would certainly seem to be a distinction between the two classes. In the case of residents, the right of succession or devolution is given by the State which imposes the tax. That State may limit the right as it pleases. Consequently it was held in the Merriam case that, assuming that the legacy there in question vested "at the moment of the testator's death, yet in contemplation of law the tax was fixed on the succession at the same moment of time." Can this be said where the estate or legacy vests under the laws of a foreign State? Does not the person in whom the estate vests, and who comes to this State to secure possession of property of the decedent situated here, so come possessed of the legal title to such property? The right of succession is not conferred upon him by the laws of this State, but by the laws of the State where the decedent resided and died. It would seem, therefore, that as against such a person, the tax, however it may be obscured or styled, is essentially a tax upon property within our jurisdiction, and not upon the right of succession thereto. If it is upon the right of succession, then plainly it is a tax upon a right granted by a foreign State. If it is not a tax upon such right, then it is simply a tax upon property acquired through the
32 instrumentality of a foreign succession law. And that in substance is what it is. In common parlance, it is a succession tax. But in legal parlance it is, as was intimated in the matter of James (144 N. Y., 10), "a tax upon property in this State passing from non-resident decedents." The latter case distinctly holds that "it is the property of the decedent which is sought to be subjected to the tax;" and that "the right of the State to impose the tax is based upon its dominion over what property is situated within its territory." But whether the court was right or wrong in the Whiting case, with regard to the bonds of the United States, there can be no doubt that it acted upon the principle that the property was tangible. There is nothing, therefore, in that case which militates against our present conclusion; nothing in the majority opinion suggestive of the view that debts or choses in action, apart from the negotiable evidences thereof, may be included in the area of property of a non-resident over which the State has jurisdiction; nothing certainly in the minority opinion.

These considerations may not seem to be in entire harmony with some of the positions taken in the Romaine case (127 N. Y., 88, 89). The facts there, however, differed somewhat from the facts of the present case. It appeared that Mr. Romaine was, at the time of his death, and had been for three years prior thereto, the lessee of a box in a safe deposit company in this city, in which he kept certain securities consisting of stocks and bonds of different corporations, and a mortgage upon real estate here, as well as several pass books showing deposits by him in various savings banks. The relation of bailor and bailee thus existed between him and the safe deposit

company. It was said that the property contained in the safe-deposit box was property protected by our laws. And so it was. So far as the coupon bonds were concerned, the case is in harmony with the later authorities. As to the stocks, however, the cor-
33 rectness of the decision under the James case depends upon a consideration as to which the record was silent, namely, whether the stocks were of domestic or of foreign corporations. As to the deposits in the savings banks, there is a distinction between the Romaine case and the present, in that there the pass books were permanently guarded in the safe-deposit box in this city. This distinction, we confess, seems to be shadowy, and we prefer to rest our judgment upon what we conceive to be the correct principle, supported as we are in that view by the doctrine of the later cases in the court of appeals, as well as by the deliberate judgment of the Supreme Court of the United States in the railroad bond case.

The conclusion at which we have arrived is amply supported not only by what was said in the James case, *and* also by the illustrative reasoning in the Phipps case (77 Hun., 325), which latter case was affirmed (143 N. Y., 641) upon the opinion of Van Brunt, *P. J.* In thus substantially adopting the views of the presiding justice in that case and in subsequently asserting similar views in the James case, the court of appeals has undoubtedly limited the Romaine case to the strictest application of its special facts, and has emphasized the general principle which was enforced in the railroad bond case. Speaking in the James case of a similar act to that now under consideration, Gray, *J.*, said: "We do not think it was the intendment of the act of 1887 to reach for purposes of taxation any personal property that was not within the State, either in fact or because of the domicile here of its owner. The reading of the act does not authorize us to construe it as an effort to tax that over which there was no jurisdiction, and it would be highly improper to impute to the legislature such an intention."

This language is equally applicable to this act of 1892, and we think it is decisive of the present appeal.

The order appealed from should be reversed, with costs.

Van Brunt, *P. J.*, Rumsey and Ingraham, *JJ.*, concur; O'Brien, *J.*, concurs in result.

34 New York Supreme Court.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

It is hereby stipulated and agreed that the annexed copy of the order of the supreme court, appellate division, first department, reversing the order of the surrogate of the county of New York, affirming the appraisement and determination of the surrogate in this proceeding, and the annexed copies of the notice of appeal to the court of appeals from such order of the appellate division, of the opinion written by said appellate division on the appeal from the order of said surrogate, and of the papers on such appeal, are true

and correct copies of the original papers on file in this proceeding, and of all the papers on which said surrogate and said appellate division made said orders. It is further stipulated and agreed that the said copies of said order, notice of appeal and papers on appeal need not be certified by the clerk of this court, and that the certification thereof be and the same is hereby waived, and it is consented that the appeal to the court of appeals be heard upon the annexed papers.

New York, April 10, 1896.

EMMET R. OLCOTT,
Attorney for the Comptroller, Appellant.

J. CULBERT PALMER,
Attorney for Administrator, Respondent.

35 At a surrogate's court held in and for the county of New York, at the county court-house, in the city of New York, on the 28th day of March, 1898.

Present: Hon. Frank T. Fitzgerald, surrogate.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

The comptroller of the city of New York having appealed to the court of appeals from an order of the appellate division of the supreme court, first department, bearing date the 11th day of April, 1896, duly entered in the office of the clerk of the city and county of New York on the same day, which order reversed the order of the surrogate of the county of New York entered herein on the 21st day of January, 1896, and the said court of appeals having reversed such order of the appellate division of this court and affirmed the said order of the surrogate with costs, and having ordered that the record and proceedings be remitted to the surrogate's court, county of New York, there to be proceeded upon according to law, now, on reading the remittitur of the court of appeals filed herein on March 26th, 1898, and on motion of J. Culbert Palmer, Esq., attorney for the administrator of John F. Houdayer, deceased, it is—

Ordered that the judgment of the court of appeals be, and the same is hereby, made the judgment of the surrogate's court of the county of New York.

It is further ordered that the appellant do resover his costs and disbursements herein as ordered by the said court of appeals.

[New York Surrogate's Seal.]

FRANK T. FITZGERALD, *Surrogate.*

36 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the honorable the surrogates of the county of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said surrogate's court in and for the county of New York, State of New York, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled In the matter of the appraisal of the property of John F. Houdayer, deceased, under the act in relation to taxable transfers of property, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction
37 of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of John H. Scudder, administrator of the estate of John F. Houdayer, deceased, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Associate Justice of the
Supreme Court of the United States.

38 [Endorsed:] Within received & returned to Supreme Court of the United States April 7, 1898. J. Fairfax McLaughlin, clerk of the surrogate's court of New York.

39 *Bond in Error.*

Supreme Court of the United States.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Know all men by these presents that we, John H. Scudder, residing in the city of Trenton, State of New Jersey, and J. H. Blackwell, of the city of Trenton, county of Mercer and State of New Jersey, and Barker Gummere, Jr., of the city of Trenton, county of Mercer and State of New Jersey, are held and firmly bound unto the comptroller of the city and county of New York in the sum of five hundred dollars (500), to be paid to the said comptroller of the city and county of New York; for the payment of which, well and truly to be made, we do bind ourselves and each of us, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the third day of March, eighteen hundred and ninety-eight.

Whereas the above-named John H. Scudder has, as administrator of the estate of John F. Houdayer, deceased, presented a writ of error to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled proceeding by the surrogate's court of the city, county, and State of New York on a remittitur from the court of appeals of the State of New York: Now, therefore, the condition of this obligation is such that if the above-bounden John H. Scudder, as such administrator as aforesaid, shall pros-

40 ecute said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN H. SCUDDER. [L. S.]
J. H. BLACKWELL. [L. S.]
BARKER GUMMERE, JR. [L. S.]

Sealed and delivered in the presence of and taken and acknowledged this third day of March, 1898, before me, of Trenton, New Jersey.

H. C. ALLEN.

Approved by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

41 UNITED STATES OF AMERICA, }
State of New Jersey, County of Mercer, } ss:

John H. Scudder, being duly sworn, deposes and says that he is a resident and freeholder within the State of New Jersey, and that he

is worth more than the sum of one thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale under execution.

JOHN H. SCUDDER.

Sworn to before me this third day of March, 1898.

H. C. ALLEN,
Notary Public of N. J.

[L. S.]

UNITED STATES OF AMERICA, *State of New Jersey, County of Mercer,* } ss:

J. H. Blackwell, being duly sworn, deposes and says that he is a resident and freeholder within the State of New Jersey, and that he is worth more than the sum of one thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale under execution.

J. H. BLACKWELL.

Sworn to before me this third day of March, 1898.

H. C. ALLEN,
Notary Public of N. J.

[L. S.]

42 UNITED STATES OF AMERICA, *State of New Jersey, County of Mercer,* } ss:

Barker Gummere, Jr., being duly sworn, deposes and says that he is a resident and freeholder within the State of New Jersey, and that he is worth more than the sum of one thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale under execution.

BARKER GUMMERE, JR.

Sworn to before me this seventh day of March, 1898.

H. C. ALLEN,
Notary Public.

UNITED STATES OF AMERICA, *State of New Jersey, County of Mercer,* } ss:

Be it remembered that on this seventh day of March, 1898, before me, the undersigned, personally appeared J. H. Blackwell, John H. Scudder, and Barker Gummere, Jr., who I am satisfied are the persons named in the within bond, and, I having first made known to them the contents thereof, they did severally acknowledge that they signed, sealed, and delivered the same as their voluntary acts and deeds for the uses and purposes therein expressed.

HARRY C. ALLEN,
Notary Public of N. J.

[L. S.]

43 [Endorsed:] Supreme Court of the United States. In the matter of the appraisal of the property of John F. Houdayer, under the act in relation to taxable transfers of property. Bond in error. J. Culbert Palmer, counselor-at-law, 165 Broadway, N. Y. city

44 UNITED STATES OF AMERICA, ss:

To the comptroller of the city and county of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the surrogate's court in and for the city and county of New York, wherein John H. Scudder, administrator of the estate of John F. Houdayer, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this fourth day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

45 CITY AND COUNTY OF NEW YORK:

On this sixth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Edwin P. Fischer, the subscriber, before me and makes oath that he delivered a true copy of the within citation to Bird S. Coler, the comptroller of the city and county of New York, at 280 Broadway, in the borough of Manhattan, city and State of New York, on the 6th day of April, 1898, between the hours of 3 p. m. and 4 p. m.

EDWIN P. FISCHER.

Sworn to and subscribed the 6th day of April, A. D. 1898.

[Seal of J. B. Paige, Notary Public, New York Co., N. Y.]

J. B. PAIGE,
Notary Public, No. 104, *New York County.*

Certificates filed in Westchester and Kings county.

STATE OF NEW YORK, }
County of New York, } ss:

I, William Sohmer, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify that J. B. Paige, before whom — annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that her signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 7 day of Ap'l, 1898.

[Seal New York.]

WM. SOHMER, *Clerk.*

46 Supreme Court of the United States.

In the Matter of the Appraisal of the Property of JOHN F. HOUDAYER, Deceased, under the Act in Relation to Taxable Transfers of Property.

Afterwards, to wit, on the — day of ——, 1898, at the October term for 1897 of the Supreme Court of the United States, at the capitol, in the city of Washington, in the District of Columbia, comes John H. Scudder, as administrator of the estate of John F. Houdayer, deceased, by J. Culbert Palmer, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First.

That the property in question being situated in the State of New Jersey, of which State also the decedent was a resident at the time of his decease, the laws of the State of New York have no application thereto nor have the courts of New York jurisdiction thereof.

Second.

That by the law as interpreted by the decision and judgment herein the legislature of the State of New York attempts to exercise jurisdiction beyond the State and to affect contracts and rights of a citizen of another State which are protected by the Constitution and laws of the United States and the judicial power granted to its courts, and violates and interferes with the sovereignty of the State of New Jersey.

47 Third.

That the act of the legislature of the State of New York herein referred to as applied to the facts and circumstances of this case or the act done under the authority of the State of New York here complained of is unconstitutional and void as being repugnant to section 10 of article I of the Constitution of the United States, in that it impairs the obligation of the contract between a non-resident depositor and the Farmers' Loan & Trust Company of New York.

Fourth.

That the said act of the legislature as interpreted by the decisions herein is repugnant to the fifth amendment of the Constitution of the United States, which provides that private property shall not be taken for a public use without just compensation.

Fifth.

That the said act of the legislature as interpreted by the decision herein is repugnant to sec. I of the 14th amendment of the Constitution of the United States, by which States are forbidden to deprive citizens of life, liberty, or property without due process of law.

Wherefore the said John H. Scudder, as administrator as aforesaid, prays that the decision herein of the surrogate's court of the county

and State of New York on the remittitur of the court of appeals of the State of New York be reversed and said proceeding be dismissed.

Dated April 4th, 1898.

J. CULBERT PALMER,
Attorney for Plaintiff in Error.

48 [Endorsed:] Supreme Court of the United States. In the matter of the appraisal of the property of John F. Houdayer, deceased, under the act in relation to taxable transfers of property. Assignment of errors. J. Culbert Palmer, counselor-at-law, 165 Broadway, N. Y. city.

49 STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

I, W. H. Shankland, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed typewritten copy of the opinions of Vann, judge, and Gray, judge, in the case of "In the matter of the appraisal for taxation of the estate of John F. Houdayer, deceased," decided by the court of appeals of the State of New York, October 6th, 1896, and reported in volume 150 of New York Reports, at page 37, &c., with the printed copies thereof, reported as aforesaid, and that the same are true and correct copies of the said printed and reported opinions; and I further certify that at the time of the rendering of said opinions and the publication thereof Edmund H. Smith was the official reporter of the court of appeals of the State of New York, and full credit and credence should be given to his official acts.

Seal Court of Appeals, State of New York.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this twenty-fifth day of February, A. D. 1898.

W. H. SHANKLAND, *Clerk.*

50 Court of Appeals, State of New York.

In the Matter of the Appraisal for Taxation of the Estate of JOHN F. HOUDAYER, Deceased.

VANN, *J.*:

On the 21st of May, 1895, John F. Houdayer died intestate at Trenton, New Jersey, where he had resided for a number of years. In 1876 he opened an account with the Farmers' Loan & Trust Company of the City of New York, as trustee under the will of Edward Husson, deceased, in which he made deposits from time to time of moneys belonging to the trust estate, as well as moneys belonging to himself. This continued as an open running account until his death, when the balance on hand was the sum of $73,715, of which $2,000 belonged to him as trustee, and the remainder to himself as individual. The appraiser deducted $3,500 for the payment of debts and expenses, and included $68,215 in the appraisal,

which was affirmed by the surrogate, but reversed by the supreme court. The theory upon which that learned court decided the case appears in the following extract from its opinion: "It is well settled that the legal relation which existed between the decedent, as such trustee, and the Farmers' Loan and Trust Company was that of debtor and creditor. The deposits became the property of the trust company, and thereupon the company became indebted to the depositor for the amount so deposited. Here, however, even this relation existed only between the decedent in his representative capacity as trustee under the will of Edward Husson and the company. Individually he occupied no contract relation toward the company. His individual deposits simply went to swell the trust account. Ordinarily it would have required an accounting
51 in equity to separate the individual from the trust deposits and to appropriate the general bank balance in accordance with just principles. Here this separation was amicably arranged between the decedent's estate and the trust estate, but this was merely a friendly substitute for an accounting. Precisely what the decedent had individually within this State was the right to an accounting in equity with regard to a debt due from the company to himself as Husson's trustee. We do not think that the debt was property within this State, within the meaning of the taxable transfer act. Much less was the right to an accounting with respect to such debt."

In my judgment this is sound reasoning upon an unsound basis, because it places form before substance. It enables a large sum of money invested and left in this State and enjoying the protection of its laws to escape taxation because the decedent had voluntarily commingled his own funds with those of an estate he represented, and for the further reasons that his rights as against the trust company were intangible. But what were his rights or those of his successors, as against the State of New York, in view of the command of its legislature that all property or interest in property within the State, susceptible of ownership, should be subject to a transfer tax upon the death of its owner, whether he was a resident or non-resident? What was the real thing, the essence of the transaction, that gives rise to this controversy? The decedent brought his money into this State, deposited it in a bank here, and left it here until it should suit his convenience to come back and get it. While the commingling of funds may complicate administration, it does
52 not change the facts as thus stated. If he had deposited in specie, to be returned in specie, there can be no doubt that the money would be property in this State subject to taxation. But, instead, he did as business men generally do, deposited his money in the usual way, knowing that not the same, but the equivalent, would be returned to him on demand. While the relation of debtor and creditor technically existed, practically he had his money in the bank and could come and get it when he wanted it. It was an investment in this State subject to attachment by creditors. If not voluntarily repaid he could compel payment through the courts of this State. The depositary was a resident corporation, and the re-

ceiving and retaining of the money were corporate acts in this State. Its repayment would be a corporate act in this State. Every right springing from the deposit was created by the laws of this State. Every act out of which those rights arose was done in this State. In order to enforce those rights it was necessary for him to come into this State. Conceding that the deposit was a debt; conceding that it was tangible, still it was property in this State for all practical purposes, and in every reasonable sense within the meaning of the transfer tax act. (*In re* Romaine, 127 N. Y., 80, 89.)

While distribution of the fund belongs to the State where the decedent was domiciled, as such distribution cannot be made until his administrator has come into this State to get the fund, possibly, after resorting to the courts for aid in reducing it to possession, the fund has a situs here because it is subject to our laws. A reasonable test in all cases, as it seems to me, is this: Where the right, wherever it may be, has a money value and can be owned and transferred,
53 but cannot be enforced or converted into money against the will of the person owing the right without coming into this State, it is property within this State for the purposes of a succession tax. Thus the right in question is property, because it is capable of being owned and transferred. It is within this State, because the owner must come here to get it. It is subject to taxation, because it is under the control of our laws. It has a money value, because it is virtually money or can be converted into money upon demand. It is subject to a transfer tax, because the passing by gift or inheritance of "all property or interest therein, whether within or without this State, over which this State has any jurisdiction for the purposes of taxation," comes within the expressed intention of the legislature.

I regard further discussion as unnecessary, as I have fully expressed my views as to the scope of the statute in the Bronson case, decided herewith.

While a majority of my associates concur in the result reached by me, they do not all concur in the reasons given therefor. They are of the opinion that a deposit of money in a bank, although technically a debt, is still money, for all practical purposes, and as such is taxable under the transfer tax act.

The order of the supreme court should therefore be reversed and the order of the surrogate affirmed with costs.

(GRAY, *J.*, dissenting:)

When the deceased made deposits with the trust company, they became the property of the depositary, and the relation which sprang up between them was that of debtor and creditor. The right of the decedent as a depositor was a mere chose in action. More than that, as the account in the trust company was with the decedent, as trustee of Husson's will, there was, of course, no clear liability to him individually. The sum owing to him could only be established as the result of an accounting or by amicable arrangement in lieu thereof; thus all that the decedent owned in
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this State at the time of his decease, to put it in its strongest expression, was the right to an equitable accounting with respect to the debt due to him as Husson's trustee. To say that that constituted "property" within the meaning of the act would be to carry the doctrine of the inheritance tax law too far for support in law or in reason.

I think the order appealed from should be affirmed with costs.

O'Brien, J., concurs with Vann, J.; Andrews, ch. J., Bartlett and Martin, JJ., concur in result of opinion of Vann, J.; Haight, J., concurs with Gray, J.

Ordered accordingly.

54½ [Endorsed:] Opinion Ct. of appeals. J. Culbert Palmer, counselor-at-law, 165 Broadway, N. Y. city.

55 All which we have caused by these presents to be exemplified and the seal of our said surrogate's court to be hereunto affixed.

Witness Hon. Frank T. Fitzgerald, a surrogate of the county of New York, at the city of New York, the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-eight, of our Independence the one hundred and twenty-second.

[New York Surrogate's Seal.]

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

I, Frank T. Fitzgerald, a surrogate of said county and presiding magistrate of the surrogate's court, do hereby certify that J. Fairfax McLaughlin, whose name is subscribed to the preceding exemplification, is the clerk of said surrogate's court of the county of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said surrogate's court, and that the attestation thereof is in due form and according to the form of attestation used in this State.

Dated New York, April 7th, 1898.

FRANK T. FITZGERALD, *Surrogate.*

STATE OF NEW YORK, }
County of New York, } ss.:

I, J. Fairfax McLaughlin, clerk of the surrogate's court of the county of New York, do hereby certify that Hon. Frank T. Fitzgerald, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogate's court of the county of New York, duly elected, sworn, and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 7th day of April, 1898.

[New York Surrogate's Seal.]

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

Endorsed on cover: Case No. 16,844. New York, New York county, surrogate's court. Term No. 276. John H. Scudder, administrator of the estate of John F. Houdayer, deceased, plaintiff in error, *vs.* The Comptroller of the City and County of New York. Filed April 11, 1898.

No. 276. 55

Brief of Palmer for P. E.

Supreme Court of the United States,

OCTOBER TERM, 1898.—No. 276.

Filed April 10, 1899

JOHN H. SCUDDER, Administrator of the Estate of JOHN F. HOUDAYER, Deceased,

Plaintiff in Error,

vs.

THE COMPTROLLER OF THE CITY AND COUNTY OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

Brief and Argument on Behalf of Plaintiff in Error.

J. CULBERT PALMER.
Of Counsel for Plaintiff in Error.

LIVINGSTON MIDDLETON CO., 63-67 GUARD ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1898. No. 276.

JOHN H. SCUDDER, as Administrator of the Estate of JOHN F. HOUDAYER, deceased, Plaintiff in Error, AGAINST The CONTROLLER OF THE CITY AND COUNTY OF NEW YORK.	In Error to the Surrogate's Court of the City and County of New York.

Brief and Argument for Plaintiff in Error.

Statement.

John F. Houdayer, a resident of the State of New Jersey, died within said State on or about the 21st day of May, 1895. Said decedent (as appears by the affidavit herein—Transcript of Record, fols. 13-16—which contains a statement of the facts upon which this case was submitted to the Appraiser) left no property whatever within the State of New York, unless a deposit in the Farmers' Loan and Trust Company of the City of New York, standing at the time of decedent's death in his name as Trustee under the last Will and Testament of Edmund Husson, deceased, and to a portion of which deposit it is admitted decedent was equitably entitled individually, can be regarded as such property.

Whether or no such deposit or such equitable right to a portion of such deposit is "property within the

State of New York," and subject to taxation under the provisions of Chapter 399 of the Laws of 1892, of the State of New York, entitled "An Act relating to taxable transfers of property" is the question at issue.

Such question was determined affirmatively by the Appraiser appointed in the transfer tax proceedings, and his report was confirmed by the Surrogate. The decision of the Surrogate was reversed by the Appellate Division of the Supreme Court, which decision was in turn reversed by the Court of Appeals of the State of New York and the decision of the Surrogate affirmed. To review such decision so affirmed a writ of error to this Court has been allowed.

The statute in question so far as it affects this case, is as follows:

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property in the following cases":

"§ 1. * * * * * *

"§ 2. When the transfer is by will or intestate law, of *property within the State*, and the decedent was a non-resident of the State at the time of his death."

* * * * * *

§ 22. "The words 'estate' and 'property' as used in this article shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees and shall include all property or interest therein whether situated within or without this State, *over which the State has any jurisdiction for the purpose of taxation.* The word 'transfer' as used in this article shall be taken to include the passing of property or any interest

therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed."

Specification of Errors.

The errors assigned in support of this Writ may be found at page 23 of the printed Record, and are as follows:

First.—That the property in question being situated in the State of New Jersey, of which State also the decedent was a resident at the time of his decease, the laws of the State of New York have no application thereto, nor have the Courts of New York jurisdiction thereof.

Second.—That by the law as interpreted by the decision and judgment herein, the Legislature of the State of New York attempts to exercise jurisdiction beyond the State and to affect contracts and rights of a citizen of another State which are protected by the Constitution and Laws of the United States and the judicial power granted to its Courts, and violates and interferes with the sovereignty of the State of New Jersey.

Third.—That the act of the Legislature of the State of New York herein referred to as applied to the facts and circumstances of this case or the act done under the authority of the State of New York here complained of is unconstitutional and void as being repugnant to Section 10 of Article I. of the Constitution of the United States, in that it impairs the obligation of the contract between a non-resident depositor and the Farmers' Loan & Trust Company of New York.

Fourth.—That the said Act of the Legislature as interpreted by the decision herein is repugnant to the fifth amendment of the Constitution of the United States, which provides that private property shall not be taken for a public use without just compensation.

FIFTH.—That the said Act of the Legislature as interpreted by the decision herein is repugnant to Sec. 1 of the 14th Amendment of the Constitution of the United States, by which States are forbidden to deprive citizens of life, liberty or property without due process of law.

POINTS.

First.

As to Jurisdiction.

The case is properly before this Court for review under Section 25 of the Judiciary Act of 1789. U. S. R. S., §709.

An analysis of the aforesaid Section of the Judiciary Act will show that there are three classes of cases which may be brought here thereunder. The case under examination is included in the *Second Class*, as the authority of the State of New York to impose a tax is questioned.

It is, however, only to cases included in the third class that the decisions in Oxley Stave Co. *v.* Butler County, 166 U. S., 650, and other similar cases, to the effect that the immunity claimed must appear upon the record to have been specially set up, are applicable.

As to the cases included in the second class, it is now fully established that it is not essential that the Federal question involved should be stated *in totidem verbis* in the Record. As to such cases, it is sufficient if the validity of a State Statute or an authority exercised under a State is drawn in question and the decision is in favor of its validity; and if the Federal question were necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of said question here.

Columbia Water Power Co. *v.* Co. Elec. S. R. L. & P. Co., U. S. Sup. Ct., Jan. 9, 1899.

It is respectfully submitted that the sole question herein is a Federal question—that nothing else was to be determined and that that must have been determined.

In the affidavit upon which the matter was originally submitted to the Appraiser, it is stated that the property in question was not "subject to taxation" (Transcript of Record, fol. 15). In the notice of appeal to the Surrogate from the decision of the Appraiser (Transcript of Record, fol. 20), it is stated that the ground for the appeal is that the "deposit in question was a chose in action belonging to a non-resident decedent, and not property within this State subject to taxation. * * * That the situs of the claim of decedent to such deposit was at the domicile of the decedent and not at the domicile of such depositary, and such property being the property of a non-resident decedent, and situated out of this State, the same does not fall within the purview of said Act."

Further, in the opinion of the Appellate Division reversing said Order of the Surrogate, it is stated (Transcript of Record, fol. 29) "Thus the Act is in harmony with the authorities which hold that the power of taxation of the State is limited to persons, property, and business within her jurisdiction (Foreign Bond Case, 15 Wall., 300). *This jurisdiction however is not what the State may choose to assert, but what, as a matter of fact it possesses;*" and after discussing the question of jurisdiction, the Court concludes (Transcript of Record, fols. 29–30) "Thus clearly this State has no jurisdiction for the purposes of taxation over the right of action here possessed by the decedent. It asserted no such jurisdiction in the Act in question, *nor could it have done so* * * * * *The State cannot create a liability in its own favor against the non-resident creditor by the mere exercise of jurisdiction over the resident debtor.*"

The opinion of the Court of Appeals refers to the opinion of the Appellate Division of the Supreme Court (Transcript of Record, fols. 50–51) in such a manner as to show conclusively that the same question was considered by the latter Court.

The record herein therefore clearly shows that the only substantial question raised and the only point

passed upon by the various Courts and finally decided adversely to the contention of the plaintiff in error was whether, under the given state of facts the Courts or the Legislature of the State of New York had any jurisdiction whatever. If the State of New York had jurisdiction it is conceded by the plaintiff in error that no writ will lie to this Court; but it is maintained that in order to arrive at a proper conclusion as to the jurisdiction of this Court, the question must first be determined upon its merits as the jurisdiction of the State of New York is involved.

The point which was actually determined by the Court of Appeals was that the situs of the chose in action in question was in the State of New York. This decision was equivalent to deciding that the State Court and the Legislature of the State had jurisdiction of the property taxed.

This question of jurisdiction was the one point involved in the whole proceeding; and the fact that a State Court in a proceeding of this character decides that it has jurisdiction of the person, property or business of a resident of another State, if, as a matter of fact, it has not jurisdiction, necessarily injuriously affects the rights of a citizen of such other State which are protected by the Constitution of the United States. This follows because taxation under such an authority is without "due process of law," and a violation of the 14th Amendment of the Constitution of the United States, since there can be no due process of law unless jurisdiction has been acquired.

As was said by Mr. Justice Field in the case of Gloucester Ferry Co. *v.* Penn., 114 U. S., at p. 208, quoting approvingly from the decision in the case of St. Louis *v.* The Ferry Co., 11 Wall., 423:

"When there is jurisdiction neither as to person nor property the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in

any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit Constitutional inhibition. *Jurisdiction is as necessary to valid legislative as to valid judicial action.*"

See also Story Conflict of Laws, Sec. 20 and 32
Hares' Amer. Con. Law, p. 317.
McCullough *v.* Maryland, 4 Wheat., at p. 429.

But, it may be contended, granting that which has been said and assuming that a Federal question is involved, nevertheless the record does not show that that question was raised in the State Courts. The answer to that is that the question of jurisdiction over a citizen of another State or over property located in another State, for the purpose of taxation, was clearly raised. This necessarily involved a Federal question, because the imposition of a tax upon a citizen of another State in the absence of jurisdiction over his person, property or business, was clearly an interference with the sovereignty of such State and an impairment of the rights of a citizen thereof which are protected by the Constitution of the United States. That the State Courts so understood it is manifest by the opinions of said Courts which are a part of the record herein. From this point of view, the jurisdiction of this Court depends upon the interpretation of the language in the record hereinbefore quoted, and the case of *Dobbins* v. *The Commissioners of Erie County, 41 U. S., 435,* is directly in point and conclusive as to the propriety of this Court taking jurisdiction herein. The opinion of the Court delivered by Mr. Justice Wayne and embodying the facts of that case is as follows:

"This cause has been brought to this Court by a writ of error to the Supreme Court of Pennsylvania. That Court reversed the judgment of the Court of Common Pleas of Erie County which it had given in favor of the plaintiff (now in error) upon an agreed statement of facts in the nature of a special verdict."

It was agreed and admitted that the plaintiff has his residence and domicile at Erie. Erie County, Pa., and

votes in said place; that he has been for the last eight years an officer of the United States, a Captain of the United States Revenue Cutter Service, and ever since his appointment has been in active service in command of the Revenue Cutter *Erie*, on the Erie station. That he has been rated and assessed with county taxes for the last three years, 1835, 1836 and 1837, as such officer of the United States, for his office, as such, valued at five hundred dollars; which taxes paid by the plaintiff amount to the sum of $10.75. The question submitted to the Court is whether the plaintiff is liable to be rated and assessed for his office under the United States for county taxes and levies? If he is, then judgment shall be entered for the defendants; if not, then judgment shall be entered for the plaintiff for the sum of $10.75."

"This is the only question submitted upon the record. We think it sufficiently appears to give the Court jurisdiction that the Supreme Court in reversing the judgment of the Court of Common Pleas and in giving judgment against the plaintiff, decided in favor of the validity of a law of Pennsylvania, subjecting the plaintiff to be rated and assessed for his office under the United States for county rates and levies; the validity of which law was in question on the ground of its being repugnant to the Constitution and Laws of the United States."

In the case under examination the record as clearly shows that an authority exercised under a State is questioned upon similar grounds.

The case of Murray *v.* Charleston, 96 U. S., 432, is also directly in point and sustains the position of the plaintiff in error.

If jurisdiction is wanting it follows as a self-evident proposition (Foreign Held Bond Case, 15 Wall,. p. 320) that the taxing power cannot be legitimately exercised. If it is exercised upon a citizen of another State it must manifestly be in violation of the sovereignty of such other State and of rights of the citizen thereof which are guaranteed by the Constitution of the United

States, and must, in the case under examination, impair the obligation of the contract between the bank and its non-resident creditor (Cooley–Cons. Lim., 6th Ed., p. 597; Hares' Amer. Cons. Law, p. 319).

It follows that the record shows that there was drawn in question an authority exercised under a State on the ground of its being repugnant to the Constitution and laws of the United States.

SECOND.

On the Merits.

I.

Assuming that the case is properly before this Court, the single question to be determined is whether the interest of decedent in the deposit in question constituted property located within the State of New York.

That the interest of decedent in the deposit in question did not constitute property located within the State of New York, would seem to follow as a necessary corollary of the following propositions, which are well established:

(*a.*) The relation of a bank to its depositor is that of debtor and creditor.

Marine Bank *v.* Fulton Bank, 2 Wall., 252.
Bank of Republic *v.* Millard, 10 Wall., 152.
Phœnix Bank *v.* Risley, 111 U, S., 127.
United States *v.* Wardwell, 172 U. S., 55.

(*b.*) The situs of a debt for the purpose of taxation is

the domicile of the creditor and not that of the debtor.

No. Central R. R. Co. *v.* Jackson, 7 Wall., 262.
Cleveland P. & A. R. R. Co, *v.* Pa., 15 Wall., 300.
Murray *v.* Charleston, 96 U. S., 432.
Savings Society *v.* Multnomah Co., 169 U. S., 431.

The foregoing propositions are established by a long line of decisions of this Court, and it is not easy to see how the chose in action in question may be taxed by the State of New York without overturning the law of the United States, as it has been settled for many years.

The majority opinion of the Court of Appeals criticises the unanimous opinion of the Appellate Division of the Supreme Court because " it enables a large sum of money invested and left in the State of New York and enjoying the protection of its laws, to escape taxation therein," and as a reason for such taxation relies upon the fact that the act of the Legislature prescribed that all property or interest in property *within the State* susceptible of ownership should be subject to a transfer tax upon the death of its owner, whether he was a resident or non-resident.

Transcript of Record (fol. 51).

Any argument based upon the foregoing statement begs the question, as the contention is that the property *was not situated in the State of New York.* Moreover, the Court apparently ignores the fact that the deposit became the property of the bank ; that the protection extended was for the benefit of the bank, and not of the depositor, and that the bank was presumably taxed for the benefit of such protection. If the amount of the deposit had been lost or stolen the bank and not the depositor would have been the sufferer.

The prevailing opinion admits that the relation of

creditor and debtor existed (fol. 52) but states that the creditor could come and get his money when he wanted it, and that the deposit was subject to the attachment of creditors. It further states that in order to enforce his rights as creditor it was necessary for him to come into the State of New York (fol. 52). The Court seems to have misapprehended the situation in this respect, as the depositor obviously, upon the refusal of the Bank to pay the entire balance remaining on deposit without deduction of the amount of the tax, could have returned to the State of New Jersey and have there sued and recovered judgment for the amount of his claim and could have there collected the same, provided he could have there found property belonging to the debtor subject to attachment and execution. Moreover, he might have brought suit in the courts of the United States, where his rights would have been amply protected, and in no sense was he restricted to the courts of the State of New York for an enforcement of his rights.

Mr. Justice Barrett in the opinion of the Appellate Division of the Supreme Court clearly distinguishes the jurisdiction necessary to enforce the remedy of attachment from that necessary for the purposes of taxation, and any argument based upon a similarity between these powers is clearly erroneous. He says (Transcript of Record, fol. 30):

> "The debtor is not the debt, and jurisdiction over the debtor is not, for the purposes of taxation, jurisdiction over his obligation. There is jurisdiction to attach, but not to tax, the debt. The right to attach proceeds upon the jurisdiction over the resident debtor. There is jurisdiction to compel such debtor to pay what he owes his creditor to the latter's creditor. In that case the attachment does not create the obligation. It enforces it. The tax, however, creates the liability, and also enforces it. That can only be done when the person or the property of the creditor is with-

in the jurisdiction. The State cannot create a liability in its own favor against the non-resident creditor by the mere exercise of jurisdiction over the resident debtor. *It can enforce an existing liability, but it cannot create one.*"

Moreover, the very point here asserted, viz.: That a general deposit in a Bank constitutes a debt and is taxable only at the domcile of the creditor is clearly established in the case of San Francisco *v.* Mackey, 22 Fed. Rep., 603, where the Court says:

> " No particular number of coins can be set down as belonging to any depositor. The general depositary has a right to mingle the money with other moneys; use the surplus moneys deposited as his own and at his own discretion. The deposit is not special, it is simply an open money account. The depositor is only entitled to so much money in amount and to no particular money, which may or may not be paid when his cheque is presented according to the ability and will of the bank with which it is deposited. The depositor is in law only a creditor to the amount of the balance held by and due from the bank or banker on an open account. He could not replevy or recover possession of any particular money. The only way to enforce payment would be to bring a suit for any balance due as on any other open account for goods sold and delivered. It is but a chose in action. Under the authorities cited, independent of statutory provisions to the contrary, such credits have no situs for taxation against the creditor apart from the person of the depositor."

The cases relied upon by the Respondent as authority for the proposition that the property in question is taxable in the State of New York relate to *tangible* property, or at most to *intangible property represented by tangible securities within the State.* As to intan-

gible property such as the chose in action in question, the authorities are all in harmony that they are taxable only at the domicile of the owner.

II.

The transfer or inheritance tax acts of most of the various States of the Union which have adopted such system, are of comparatively recent origin, and the principles controlling the levy and collection of such taxes are different and in some cases conflicting. It should be the policy of the Courts to so construe the laws as to avoid, if possible, the objectionable result of double taxation. This result necessarily follows, in many cases in this country, from the Federal form of Government, and from the fact that many decedents leave *tangible* personal property in States other than that of their domicile. In such cases no doubt seems to exist as to the validity of a tax enforceable in both States. The result of double taxation, however, should not be unnecessarily extended, as it is obviously a hardship.

Similar tax laws have existed in England for more than a century, and the Courts of that country struggled for many years with the problems at present engaging the attention of our jurists. It is now established in England that the tax is payable if the English law governs the succession; otherwise the tax is not payable even if the property is located in England. It has been found that this conclusion aids materially the interests of justice and leads to satisfactory results.

Am. & Eng. En. of Law, Vol. 24, p. 454.

While it may be that the conflicting interests of the Sovereign States of the Union may prevent the adoption of a similar theory in this country, yet it should be the policy of this Court to aid substantial justice by preventing double taxation of citizens of the Union where it is possible so to do.

THIRD.

The order of the Court of Appeals reversing the order of the Appellate Division, should be reversed and the order of the Appellate Division reversing the order of the Surrogate confirming the order of the Appraiser should be affirmed.

J. CULBERT PALMER,
Of Counsel for Plaintiff in Error.

No. 55.

Brief of Olcott for Appellee.

Filed Oct. 4, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.
No. 276.

Also No. 55.

JOHN H. SCUDDER, ADMINISTRATOR OF JOHN F. HOUDAYER, DECEASED,

Plaintiff in Error,

vs.

THE COMPTROLLER OF THE CITY AND COUNTY OF NEW YORK,

Defendant in Error.

BRIEF OF ARGUMENT IN BEHALF OF THE COMPTROLLER OF THE CITY OF NEW YORK, DEFENDANT IN ERROR AND APPELLEE.

EMMET R. OLCOTT,
Attorney and of Counsel for Defendant in Error and Appellee,
35 Broadway, New York City.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 276.

JOHN H. SCUDDER, Administrator of John F. Houdayer, deceased,
Plaintiff in Error,

vs.

THE COMPTROLLER OF THE CITY AND COUNTY OF NEW YORK,
Defendant in Error.

BRIEF OF ARGUMENT IN BEHALF OF THE COMPTROLLER OF THE CITY OF NEW YORK, DEFENDANT IN ERROR AND APPELLEE.

Statement of Facts.

The decedent, John F. Houdayer, died May 21, 1895, intestate, and a resident of the State of New Jersey.

Decedent *in January*, 1876, opened an account with the Farmers' Loan and Trust Company (of the City of New York), as trustee under the will of Edmund Husson (see p. 6, Printed Case), in which, from time to time, he made deposits belong-

ing to said trust estate, and as appeared by his private books of account, he also, from time to time, made deposits of money belonging to himself individually. These deposits were subject to sight draft, were frequently drawn on by check by decedent, and were maintained constantly as an open running account from the date of the first deposit to the time of decedent's death, at which time the total amount of such deposits was $73,715, of which his individual deposits, as shown by his own books of account, amounted to $71,715.

On the petition of the Comptroller of the City of New York, in the County of New York, the person designated by law to represent the State of New York, in such county, the Surrogate of the County of New York under the provisions of the then transfer tax act of the State of New York, known as Chapter 399 of the Laws of 1892, appointed an appraiser to appraise the property of the decedent, John F. Houdayer within the State of New York, at the time of his death, subject to the tax imposed by the said act.

Notices were sent by the Appraiser to all the parties in interest and John H. Scudder, administrator of the goods, chattels and credits which were of the said John F. Houdayer, deceased, the plaintiff in error, appeared before such appraiser by his attorney J. Culbert Palmer, who is his attorney of record in this Court.

Page 6, printed case.

The appraiser appointed by the Surrogate reported that the estate of the decedent consisted of cash on deposit with the Farmers' Loan and Trust Company of New York in the amount of $71,715, that the *pro rata* of debts and expenses of administering the estate amounted to $3,500, leaving a net personal estate in New York subject to such tax amounting to $68 215. On this report the usual order was entered, as of course (January 17, 1896) fixing the tax. From such order the administrator appealed to the

Surrogate, who affirmed the first order by another order (January 21, 1896), from which the Plaintiff in Error appealed to the Appellate Division of the Supreme Court of the State of New York for the First Department which reversed the order of the Surrogate. Thereupon, the Comptroller of the City of New York appealed to the Court of Appeals of the State of New York, which reversed the order of the Appellate Division referred to and appealed from, and affirmed the order of the Surrogate.

The plaintiff in error thereupon filed a writ of error and cited the Comptroller of the City of New York to appear in this Court.

The plaintiff in error assigns as his grounds in error--

FIRST.

That the property in question being situated in the State of New Jersey, of which State also the decedent was a resident at the time of his decease, the laws of the State of New York have no application thereto, nor have the courts of New York jurisdiction thereof.

SECOND.

That by the law as interpreted by the decision and judgment herein, the Legislature of the State of New York attempts to exercise jurisdiction beyond the State, and to affect contracts and rights of a citizen of another State which are protected by the Constitution and laws of the United States and the judicial power granted to its courts, and violates and interferes with the sovereignty of the State of New Jersey.

THIRD.

That the act of the Legislature of the State of New York herein referred to as applied to the facts and circumstances of this case or the act done under the authority of the State of New York here com-

plained of is unconstitutional and void as being repugnant to Section 10 of Article 1 of the Constitution of the United States, in that it impairs the obligation of the contract between a non-resident depositor and the Farmers' Loan and Trust Company of New York.

FOURTH.

That the said act of the Legislature as interpreted by the decisions herein is repugnant to the Fifth Amendment of the Constitution of the United States, which provides that private property shall not be taken for a public use without just compensation.

FIFTH.

The said act of the Legislature as interpreted by the decision herein is repugnant to Section 1 of the 14th Amendment of the Constituiton of the United States, by which States are forbidden to deprive citizens of life, liberty, or property without due process of law.

The contention of plaintiffs in error before the Court of Appeals of the State of New York was that decedent mingled his own funds with those of the trust estate of Edmund Husson, and that his representatives, on his decease, succeeded merely to a right to an action for an accounting, which, having been held, the administrator would still hold merely a chose in action in the nature of a claim against the Trust Company; that the situs of a debt is the domicile of the creditor and not of the debtor; that the property in or claim to the deposit was never located in the State of New York; that a debt held by the estate of a non resident decedent against a resident of the State of New York was not taxable under the act in question, for there must be some definite entity, some distinct parcel of actual

property, tangible or well-defined, located within the State of New York, or that if the deposit in the Trust Company could be regarded as in the nature of property, it was not taxed, because property transiently within the State of New York is not taxable.

But the record below fails to disclose that any Federal question sought to be raised here was presented in the State Court.

Whatever issues are in the case will be found in the petition of the Comptroller of the City of New York (p. 3 of the Record), in the affidavits of the plaintiff in error (pp. 6, 7, 8 of the Record), and in the notice of appeal of the plaintiff in error (p. 10 of the Record) from the order made by the Surrogate of New York County—acting as Assessor—"as of course" to the Surrogate acting as a Judicial officer on the appeal.

The petition of the Comptroller (p. 3 of the Record) alleged. His official position;

The death of the decedent in New Jersey and his ownership of property in the State of New York;

The appointment of plaintiff in error with Louise Hondayer as decedent's administrators;

That no application had been made to the courts of New York for administration on decedent's estate, being certain moneys on deposit in the State of New York, which decedent's administrators endeavored to remove without payment of the tax fixed by law under the transfer tax act or application for an appraiser to appraise decedent's property under such act, which was subject to the tax imposed by such act;

The names of the persons entitled to decedent's property under the laws of New Jersey and the names and addresses of all parties interested.

In his first affidavit (p. 8 of the Record) plaintiff in error states: "Deponent further says that he "understands and believes that proceedings have "been instituted by the authorities of the State of "New York to appraise, for the purpose of levying

" a tax thereon, the property of decedent within " the State of New York, in which he believes it is " intended to include the amount on deposit in the " Farmers' Loan and Trust Company as aforesaid. " Deponent further says that he objects to such " proceedings, and opposes a levy of any such tax " upon such amount so on deposit *and claims that* " *said deposit is exempt under the laws, and not* " *subject to taxation.*"

The second affidavit is not material to the issue.

In his notice of appeal hereinbefore referred to, plaintiff in error states (p. 10 of the Record) that the ground of his appeal is "that the de- " posit in the Farmers' Loan and Trust " Company of $71,715 standing at the time of " decedent's death in his name as trustee, was a " chose in action belonging to a non-resident dece- " dent and *not property within this State* " (that is, the State of New York) " *subject to taxation under* " *the provisions of the Act in relation to taxable* " *transfers of property;* that the situs of the claim " of decedent against such deposit was at the domi- " cile of the decedent and not at the domicile of the " said depository, *and such property being the prop-* " *erty of a non-resident decedent and situated out of* " *this State* " (that is, the State of New York) " *the* " *same does not fall within the purview of said* " *Act. Even if regarded as property within this* " *State* " (that is, the State of New York) " *it is not* " *taxable thereunder*, because such property was " only transiently within this State " (that is, the State of New York).

"In any event, the expenses of administering the " estate should be deducted from the amount of the " deposit."

The issues thus raised were not changed in any- wise during the entire case.

In the notice of appeal by plaintiff in error (p. 12 of the Record), from the order of the Surrogate of New York County to the Appellate Division of the New York Supreme Court for the First De-

partment, he appeals "to the Appellate Di-
"vision of the Supreme Court from the
"order entered herein on the twenty-first
"day of January, 1896, which affirmed the order
"made on the seventeenth day of January, 1896,
"fixing the transfer tax due on the interests of the
"parties entitled to the estate of said decedent."
The notice of appeal by the Comptroller of the City of New York to the Court of Appeals (p. 3 of the Record) merely appeals from the order of the Appellate Division to that Court.

The report of the opinion of the New York Court of Appeals shows that it assumed it was dealing solely with Chapter 399 of the Laws of 1892 of the State of New York.

As to the motion to dismiss the case.

The Federal questions sought to be raised here, not having been presented in the State Court, the case should be dismissed for want of jurisdiction.

This point has been repeatedly passed upon by this Court.

In Murdock *v.* City of Memphis, 20 Wall, 590, Mr. Justice Miller, delivering the opinion of the Court, says: "Finally, we hold the following propositions
"on this subject as growing from the statute as it
"now stands:

"That it is essential to the jurisdiction of this
"Court over the judgment of the State Court that
"it shall appear that one of the questions men-
"tioned in the act must have been raised and pre-
"sented to the State Court."

In Moore *v.* Miss., 21 Wall, 638, the Chief Justice, delivering the opinion of the Court, said:

"We are not required to re examine the judg-
"ment of the said Court simply because a Federal

"question may have been decided. To give us "jurisdiction, it must appear that such a question "was necessarily involved in the decision."

Armstrong *v.* Treas. of Athens Co., 16 Peters, 282.

In Winona & St. Peter Land Co. *v.* Minnesota (No. 2), 159 U. S., 540, the Court held that the Federal question sought to be raised here, not having been presented to the State court, the case must be dismissed for want of jurisdiction. Mr. Justice Brewer delivering the opinion of the Court cited the following cases:

Spies *v.* Illinois, 123 U. S., 131, 181.
Brooks *v.* Missouri, 124 U. S., 394.
Chappell *v.* Bradshaw, 128 U. S., 132.
Brown *v.* Massachusetts, 144 U. S., 573.
Schuyler National Bank *v.* Bollong, 150 U. S., 85.
Powell *v.* Brunswick County, 150 U. S., 433.
Miller *v.* Texas, 153 U. S., 535.
Morrison *v.* Watson, 154 U. S., 111.
Sayward *v.* Denny, 158 U. S., 180.
See also Leydon *v.* Davis, 170 U. S., 36.

In Rutland R. R. Co. *v.* Central Vermont R. R. Co., 159 U. S., 630, Mr. Justice Gray, delivering the opinion, this Court held:

It is well settled, by a long series of decisions of this Court, that where the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question.

Murdock *v.* Memphis, 20 Wall., 590.
Jenkins *v.* Lowenthal, 110 U. S., 222.
Beaupre *v.* Noyes, 138 U. S., 397.

Walter A. Wood Co. *v.* Skinner, 136 U. S., 293.
Hammond *v.* Johnston, 142 U. S., 73.
Tyler *v.* Cass County, 142 U. S., 288.
Delaware Co. *v.* Reybold, 142 U. S., 636.
Eustis *v.* Bolles, 150 U. S., 361; in the last two of which many other cases to the same effect are cited.

In Union National Bank *v.* Louisville, New Albany & Chicago R. R. Co., 163 U. S., 325, Mr. Justice Brewer delivering the opinion, this Court held:

"At the outset we are met with the question "whether this Court has jurisdiction." In Eustice *v.* Bolles, 150 U. S., 361, 366, it was held:

"It is likewise settled law that, where the record "discloses that if a question has been raised "and decided adversely to a party claiming the "benefit of a provision of the Constitution or "laws of the United States, another ques- "tion, not Federal, has been also raised and de- "cided against such party, and the decision of the "latter question is sufficient, notwithstanding the "Federal question, to sustain the judgment, this "Court will not review the judgment."

In Oxley Stave Co. *v.* Butler County, 166 U. S., 648, Mr. Justice Harlan, delivering the opinion, this Court held: "That the Court cannot review the "final judgment of the highest court of a State "even if it denied some title, right, privilege or "immunity of the unsuccessful party, unless it ap- "pear from the record that such title, right, privi- "lege or immunity was 'specially set up or claimed' "in the State court as belonging to such party under "the Constitution or some treaty, statute, commis- "sion or authority of the United States (Rev. Stat., "Sec. 709)."

The words "specially set up or claimed" in that section imply that if a party in a suit in a State court intends to invoke, for the protection of his

rights, the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare, "specially," that is, unmistakably, this Court is without authority to re examine the final judgment of the State court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.

In Levey *vs.* Superior Court of San Francisco, 167 U. S., 175, Mr. Justice Harlan, delivering the opinion, this Court held, following the case of Oxley Stave Co. *v.* Butler, 166 U. S., 648, that "the jurisdiction "of this Court to re-examine the final judgment of "a State court cannot arise from inference, but "only from averments so distinct and positive as to "place it beyond question that the party bringing a "case here from such Court intended to assert a "Federal right."

In Miller *v.* Cornell R. R. Co., 168 U. S., 131, Mr. Chief Justice Fuller, delivering the opinion, the Court held, that if the ground on which the jurisdiction of this Court is invoked to review a judgment of a State court is, that the validity of a State law was drawn in question as in conflict with the Constitution of the United States, and the decision of the State court is in favor of its validity, this must appear on the face of the record before the decision below can be re-examined here.

A suggestion of such appearance, made on application for reargument, after the judgment of the trial Court is affirmed by the Supreme Court of the State, comes too late.

This Court has no jurisdiction on a writ of error to a State court to declare a State law void on account of its collision with the State Constitution.

An objection in the trial of an action in a State court that an act of the State was "unconstitutional and void" when construed in those courts as raising the question whether the State Legislature had power, under the State Constitution, to pass the act,

and not as having reference to any repugnance to the Constitution of the United States, is properly construed.

The report of this case in the Supreme Court of Pennsylvania shows that it assumed that it was dealing, under the assignments of error, only with the State Constitution.

In Muse *v.* Arlington Hotel Company, 168 U. S., 430, Mr. Chief Justice Fuller delivering the opinion, the Court held:

> A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect to the possession of the right must be distinctly deducible from the record, before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision.

The same rule being applicable in respect of the validity or construction of a treaty, some right, title, privilege or immunity, dependent on the treaty, must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted.

In respect of the plaintiffs' case as stated in their complaint, the Circuit Court decided no question as to the application or construction of the Constitution, or the validity or construction of the treaty, and this Court is without jurisdiction to review the action of that Court.

In Kipley *v.* Illinois, 170 U. S., 186; this Court held, Mr. Justice Harlan delivering the opinion:

> " We are of opinion that this Court is without " jurisdiction to review the final judgment of the " Supreme Court of Illinois in these cases. The " answer makes no reference whatever to the Con- " stitution or laws of the United States. It is true " that it avers that the Illinois Civil Service Act

"was 'unconstitutional and void.' But when "the jurisdiction of this Court is invoked for "the protection against the final judgment of "the highest Court of a State, of some title, "right, privilege or immunity secured by the "Constitution or Laws of the United States, it "must appear expressly or by necessary intend- "ment, from the record, that such right, title, "privilege or immunity, was 'specially set up or "claimed' under such constitution or laws (Rev. "St., 709). Our jurisdiction cannot arise in such "case from inference, but only from averments so "distinct and positive as to place it beyond question "that the party bringing the case up intended to "assert a Federal right (Oxley Stove Co. *vs.* Butler "Co., 166 U. S., 648; Levey *vs.* Superior Court of "San Francisco, 167 U. S., 175, 177)."

The averment in the answer that the Statute "of Illinois was unconstitutional and void must be "taken as intended to apply to the Constitution of "that State, and not to the Constitution of the "United States. In Miller *v.* Cornwall R. R., 168 "U. S., 131, 134, this Court, speaking by the Chief "Justice, said: 'We have no jurisdiction in a writ of "error to a State court to declare a State law void "on account of its collision with a State Constitu- "tion, and it was long ago held that where it "was objected in the State courts that an "act of the State courts was unconstitu- "tional and void,' the objection was construed "in those courts as raising the question whether "the State Legislature had the power under the "State Constitution to pass the act, and not as hav- "ing reference to any repugnance to the Constitu- "tion of the United States (Porter *vs.* Foley, 24 "How., 415)."

"It is manifest that when the answer was drawn "neither the defendant Kepley nor the learned "counsel representing him intended to raise any "Federal question. We cannot suppose that it

" occurred to either of them at that time that the " Civil Service Act of Illinois was repugnant to the " Constitution of the United States."

As to the merits of the judgment of the State court imposing the tax under Chapter 399, Laws of New York, 1892.

I.

This Court has held that such tax " is not on money ; it is on the right to inherit and hence a condition of inheritance."

Such are the very words of this Court as expressed in

Magoun *v.* The Illinois Trust & Savings Bank, 170 U. S., 283-294.

Now, the right of the representatives of Houdayer, the deceased, in the case at bar, to take the fund in the Farmers' Loan and Trust Company of New York, a corporation created under the laws of the State of New York, was a statutory privilege conferred by the State of New York, and therefore the authority which confers it may impose conditions on it, that is by requiring payment of a transfer tax before letting it go. It has done so, and this Court has declared the same constitutional.

Magoun *v.* The Ill. Trust & Savings Bank (*supra*).

United States *v.* Perkins, 163 U. S., 625-631.

What are these limitations or restrictions imposed by the State of New York?

The State " appropriates for its own use a portion

of the property *at the moment of its owner's decease* and allows only the balance to pass."

Matter of Swift, 137 N. Y., 77.

Matter of Merriam, 141 N. Y., 484:

"The State limits the power of testamentary disposition, and legatees and devisees take their bequests and devises subject to this tax imposed on the succession of property."

Matter of Merriam, 141 N. Y., 484:

"A certain deduction shall be taken which is to be paid into the public treasury and for convenience is called a tax."

Matter of Hamilton, 140 N. Y., 213:

"The State is made one of the beneficiaries. It lays its hands under such circumstances and claims a share."

Clymer *v.* Commonwealth, 2 P. F. S., 186:

"If the law-making power of the State *where the property happens to be situated or the debtor of the deceased reside*, to subserve its own policy, has engrafted qualifications or restrictions upon the rights of those who would succeed to the estate by the law of the domicile, *they must take their rights subject to such restrictions.*" * * *

Peterson *v.* Chemical Bank, 32 N. Y. 44.

In the matter of Swift, 137 N. Y., 77, the learned Judge who wrote the opinion says (p. 86): "As to goods and chattels, their transmission is subject to the permission of and regulated by the laws of the State where situated. Jurisdiction over them belongs to the courts of the State or the country for all purposes of policy or of administration in the interests of its citizens or of those having enforceable rights."

The Legislature of New York provided by Section 2694 of the Code of Civil Procedure of the State of

New York that testamentary disposition or descent of real property not disposed of by a will shall be regulated by the laws of the State without regard to the residence of a decedent, and further in these words, "*except where special provision is otherwise* " *made by law* the validity and effect of a testa- " mentary disposition of any other (that is, per- " sonal) property situated within the State, and " the ownership and disposition of such property, " where it is not disposed of by will, are regu- " lated by the laws of the State or country of which " the decedent was a resident at the time of his " death."

Section 2514 of the same Code prescribes the rule as to what constitutes " personal property." It declares " the expression 'personal property' signifies every kind of property which survives a decedent, other than real property," as defined in the same subdivision; and that the expression " real property " includes " every estate, interest and right, legal or equitable, in lands, tenements or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof, or in any manner entitled thereto, and except those which are declared by law to be assets."

" Assets " by the same section are defined to signify " *personal* property applicable to the debts of the decedent."

As to the authority to issue ancillary letters under Sections 2695 and 2696 of the Code by " the Surrogate's Court having jurisdiction of the estate," the existence of property in this State is the sole condition precedent, and the Surrogate having jurisdiction of the estate *must* issue letters ancillary.

By Section 2701 of the Code the person having ancillary letters may not only be required to pay the debts of the decedent due local creditors out of the money or avails of property received under the ancillary letters, but also " *to distribute the same among legatees or next of kin, or otherwise dispose of the same as justice requires.*"

The cogent language of Section 2694 of the Code,

"*except where special provision is otherwise made by law,*" stands boldly forth in the reservation made by the Legislature, and such special reservation and provision as a limitation upon the right of the non-resident to take away any property without the payment of the transfer tax, is found in Chapter 399 of the Laws of 1892:

FIRST.—Section 1 provides that "*all property,*" real and personal, shall be taxed, except as exempted.

SECOND.—Section 3 requires that the tax imposed "*shall be and remain a lien* upon the property transferred until the tax be paid."

THIRD.—Section 10 limits the right to ancillary letters testamentary and of administration by providing that the petition must state the value of the property of the non resident, and that the County Treasurer or Comptroller must be cited and upon the return of the citation the Surrogate must fix the amount of tax and the decree treat the County Treasurer or Comptroller *as a creditor of the decedent.*

Then in order to safeguard the claim of the State to its transfer tax on the property of non-residents against the possible contingency that foreign executors, administrators or trustees without coming into the State for letters testamentary, or of administration, or the recognition here of foreign deeds of trust, might or could assign or transfer any stock *or obligations* in this State standing in the name of the decedent or in trust for the decedent or demand delivery and receive other securities or *assets*, the Legislature made a sweeping direction in Section 9 of the Act that no such transfers of stock or obligations should be made *without payment of the tax*, and no delivery made of such securities or *assets* without notice to the County Treasurer or Comptroller.

Thus we find in Section 10 of the Act provisions

relating to cases where ancillary letters testamentary or of administration are applied for in this State, and in Section 9 the rule as to all other cases.

Section 9 of the Act referred to is given in the next paragraph.

FOURTH.--Section 9 of the act says: "If a foreign executor, administrator or trustee shall assign or transfer any stock *or obligations* in this State standing in the name of a decedent, or in trust for a decedent, liable to any such tax the tax shall be paid to the treasurer of the proper county or the Comptroller of the City of New York on the transfer thereof. No safe deposit company, bank or other institution, person or persons holding securities *or assets* of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent unless notice of the time and place of such intended transfer be served upon the County Treasurer or Comptroller at least five days prior to the said transfer."

These provisions, with the Code provisions as to wills, inheritances and distributions of the estates of non-residents, clearly show that the Legislature, having the right to regulate the transfer of property within its limits, bearing in mind that whoever sends property in such territory impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction of the domicile of the owner,

(Green *v.* Van Buskirk, 5 Wall, 307.
Hervey *v.* Locomotive Works, 93 U. S., 671.
Harkness *v.* Russell, 118 U. S., 679.
Walworth *v.* Harris, 129 U. S., 355.)

and taking into account that unless restrained by the provisions of the Federal Constitution, the power of the State as to the mode, form and extent

of taxation, is unlimited where the subjects to which it applies are within her jurisdiction, as set forth *in a few only* of the authorities next following—

(Matter of Sherwell, 125 N. Y., 379.
Matter of McPherson, 104 N. Y., 316.
People *v.* Equitable Trust Co., 96 N. Y., 387.
Stuart *v.* Palmer, 74 N. Y., 183.
Gardner *v.* Carnes, 47 N. Y., 608.
People *v.* Lawrence, 41 N. Y., 137.
Howell *v.* City of Buffalo, 4 Tr. App. R., 505.
Brewster *v.* City of Syracuse, 19 N. Y., 116.
The Town of Guilford *v.* Board of Supervisors, 3 Kern R., 143.
People *v.* Mayor of Brooklyn, 4 N. Y., 419.
Providence Bank *v.* Billings, 4 Peters R., 514.
Matter of Swift, 137 N. Y., 77.
Matter of Merriam, 141 N. Y., 479),

chose to limit the transfer by will, or the ownership not passing by will of property of non-residents of this State.

Nor are such provisions confined to the State of New York, for the right of the State of Massachusetts to tax the property of non-resident decedents having been questioned, it was held by the Supreme Court of Massachusetts in a recent case that the Massachusetts Statute of 1891, Chapter 425, Section 1, applies to foreign wills and the property that passes under the statutes of Massachusetts of similar import to the sections of our Transfer Tax Act and the provisions of our Code in Section 2694.

The case referred to was Callahan *v.* Woodbridge, decided by the Supreme Judicial Court of Massachusetts in August, 1898 (51 N. E. R.), 176, and the Court said that the Massachusetts Statute of 1891,

Chap. 425, Section 1, providing a collateral legacy and succession tax on all property within the commonwealth, "whether belonging to the inhabitants of the commonwealth or not, * * * which shall pass by will or by the laws of the commonwealth regulating intestate succession," applies to foreign wills, and the property that passes under Pub. St., Chap. 138, Section 1, providing that the property of a non-resident, after death, shall "be disposed of according to the laws of the State or country of which he was an inhabitant."

The Court stated:

"The appellant raises the preliminary question "whether the probate court has jurisdiction over a "case of this kind. We are of opinion that it has. "Section 14 of this chapter expressly provides that "'the probate court having jurisdiction of the settle- "ment of the estate of the decedent shall have "jurisdiction to hear and determine all questions in "relation to said tax that may arise affecting any "devise, legacy or an inheritance under this tax,' "&c. The decedent was a non-resident, and these "proceedings relate only to the property found in "this commonwealth. So far as this property is "concerned, the probate court has jurisdiction of "the settlement of the estate of the decedent (Pub. "St. C., 156, Sec. 2; *Id.*, C. 127, Secs. 15-17; *Id.*, "C., 138, Secs. 1, 2). Under the express provisions "of the section last cited it may regulate the set- "tlement of the estate, not only in regard to the "collection of assets and the payment of debts, but "it may afterwards make final distribution of the "property, or pay it over according to the will, or "may, in its discretion, cause it to be transmitted "to the executor or administrator, if any, in any "State or country where the deceased had his domi- "cile (Welsh *v.* Adams, 152 Mass., 74, 25 N. E., 84). "The question as to the liability to pay a tax is "a question affecting a devise, legacy or inheri-

" tance, under the act; for if the tax is " paid, the devise, legacy or inheritance will " be diminished by the payment. It seems " clear that the case is within the statute of 1891 " (Chap. 425, Sec. 14), *and we have no occasion to* " *inquire whether the probate court has jurisdiction* " *under other statutes* (Essex *v.* Brooks, 164 Mass., " 79, 41 N. E., 119; see St. 1891, Chap. 415; Swasey " *v.* Jaques, 144 Mass., 135, 10 N. E. 758).

" The constitutional authority of the Legislature " to lay an excise tax upon the privilege of succes- " sion to property after the death of the former " owner of it was established by this court in Minot " *v.* Winthrop (162 Mass., 113, 38 N. E., 512), and " is generally recognized by courts elsewhere (At- " torney-General *v.* Bouwens, 4 Mees. & W., 171; " Stern *v.* Reg. (1896), 1 Q. B., 211; Thompson *v.* " Advocate-General, 12 Clark & F., 1; State *v.* Dal- " rymple, 70 Md., 294, 17 Atl., 82; *In re* Romaine; " 127 N. Y., 80, 27 N. E., 759; *In re* Swift, 137 N. " Y., 77-84, 32 N. E., 1096; Orcutt's Appeal, 97 Pa. " St., 179; Small's Estate, 151 Pa. St., 1, 25 Atl., 23, " Alvany *v.* Powell, 55 N. C., 51). The legal right of " the Legislature to make such a provision in regard " to the property of a non-resident owner rests upon " the fact that the property is within the State, and " subject to its jurisdiction. This power is as large " in reference to the property of a non-resident deced- " ent as to that of the inhabitants of the common- " wealth. It covers the property within the jurisdic- " tion. A ground for its exercise is that the prop- " erty has the protection of our laws, and that our " laws are invoked for the administration of it " when a change of ownership is to be effected. " In the statute before us the succession to prop- " erty of non-residents is expressly taxed, as if the " property belonged to inhabitants of the common- " wealth. The language, 'which shall pass by " will or by the laws of the commonwealth regu- " lating intestate succession,' taken in connec- " tion with the clauses immediately preceding

"it, applies to foreign wills, *and to property* "*that passes under the statute of this com-* "*monwealth which regulates the succession to the* "*property of a non resident owner after his death,* "*and declares that it shall 'be disposed of accord-* "*ing to the laws of the State or country of which he* "*was an inhabitant'* (Pub. St., C. 138, Sec. 1).

"Upon the facts before us, there is no doubt that "all the property referred to was within the juris- "diction of this commonwealth, so as to come "within the statute, unless it be the note with "mortgage security upon land in Kansas City. "There was real estate in Boston, *there was a small* "*amount of cash on hand,* and the rest of the prop- "erty was in bonds of railroad companies, of the "City of Zanesville, Ohio, of the State of New "Hampshire, and of the United States, all of which "were completely transferrable by delivery, and "were commonly bought and sold in the market in "this commonwealth. The statute applies to prop- "erty 'tangible or intangible.' Without any pro- "vision in regard to intangible property, the prop- "erty above described would be included, because "it was all tangible, passing from hand to hand, "and was as completely within the jurisdic- "tion of our laws as ordinary chattels. * * * "The language of our statute is too clear to "admit of a doubt that such property as that to "which we have referred was intended to be cov- "ered by it. Whether the note and mortgage were "property within the jurisdiction of the common- "wealth is a different question, which, upon the "facts stated, it is not necessary to decide. * * *"

There is no inherent, natural or absolute right to inherit or succeed to property, nor to make disposition after death by bequest or devise and the right to take property is the creature of law—being lawful for the State to withhold altogether the privilege of acquiring property within its dominion by will or inheritance, it is lawful for the Legislature to annex such conditions to the privi-

lege as may seem expedient. In the exercise of this power with the Code provisions, inheritance and distribution of the estates of non-resident decedents, the Legislature of the State of New York has attached as a condition precedent for the privilege of succession to property within the State, of non-residents, that the tax known as the transfer tax shall be paid, and the person in whom the estate of the non-resident decedent vests, who comes or sends to this State to secure possession of his property, comes here posseesed only of the legal title to the property, *less the tax;* for, *eo instante,* at the moment of the death of the decedent, the State of New York "appropriates for its own use a portion of the property, and only allows the balance to pass," and the right of succession is not conferred by the laws of the State where the decedent resided and died, except as to such balance.

Such is the law of the State of New York and as recognized by this Court.

Matter of Swift, 137 N. Y., 77.
Matter of Merriam, 141 N. Y., 479.
Matter of Hoffman, 143 N. Y. 593.
Matter of Collom, 145 N. Y., 593.
Matter of Hamilton, 140 N. Y., 213.
Mager *v.* Grima, 8 How., 491.
Frederickson *et al. v.* State of Louisiana, 23 How., 447.
Wallace *v.* Myers, 38 Fed. Rep., 185.
Pollock *v.* Farmers' Loan and Trust Company, 157 U. S. Rep , 578.
United States *v.* Perkins, 163 U. S., 625.
Magoun *v.* The Ill. Trust & Savings Bank (*supra*).

"*Sic volo sic jubeo*" is the language of a sovereign, and in respect to State taxation of property within the State the State is a sovereign power.

Hence, if the State has seen fit to define what is

taxable, who can gainsay its right as to the "mode, form and *extent* of taxation?"

The principle of taxation, as the corelative of protection, perfectly just in itself, is as applicable to a non-resident as to a resident owner, because civil government is essential to give value to any form of property without regard to the ownership; and taxation is indispensable to civil government.

Nor can there be any doubt that the State has power to tax personal property, even when separated from its owner.

As observed by Mr. Justice Story (Conflict of Laws, §§ 297-311): "Although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice, that the actual situs of the thing should be examined. A nation within whose territory it is actually situate, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

The old rule expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, the rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used.

Green *v.* Van Buskirk, 5 Wall., 307; 7 Wall., 139.

Hervey *v.* Rhode Island Locomotive Works, 93 U. S., 664.

Harkness *v.* Russell, 118 U. S., 663, 679.

Walworth *v.* Harris, 129 U. S., 355.

Story on Conflict of Laws, § 550.

Wharton on Conflict of Laws, §§ 297-311.
Lewis *v.* Woodford, 58 Tenn., 25.
Birthwhistle *v.* Vardhill, 5 Barn. & C., 438-451.
Albany *v.* Powell, 2 Jones Eq., 57.
American Coal Co. *v.* County Comrs. of Allegheny Co., 59 Md., 185.
Mayor, &c., of Baltimore *v.* Baltimore City Passenger R. Co., 57 Md., 31.

For the purposes of taxation, this Court has repeatedly affirmed that personal property may be separated from its owner, and that he may be taxed on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen of the State which imposes the tax.

Lane County *v.* Oregon, 7 Wall., 71, 77.
Railroad Co. *v.* Pennsylvania, 15 Wall., 300, 323, 324, 328.
Railroad Co. *v.* Penniston, 18 Wall., 5, 29.
Tappan *v.* Merchants' Bank, 19 Wall, 490, 499.
State Railroad Tax Cases, 92 U. S., 575, 607, 608.
Brown *v.* Houston, 114 U. S., 622.
Coe *v.* Errol, 116 U. S., 517, 524.
Marye *v.* Baltimore & Ohio R. R., 127 U. S., 117, 123.

The Courts of the State of New York have followed the same principle of the separation of personal property from the owner. The question came up in the Court of Appeals in People *ex rel.* Jefferson *v.* Smith *et al.*, 88 N. Y., 580, and the Court said:

"It is undoubtedly a general rule of law that "movable property is deemed to have no situs ex- "cept that of the domicile of the owners, yet this

"being but a legal fiction, it yields whenever it is "necessary for the purpose of justice, that the "actual situs of the thing should be examined, and "whenever the legislative intent is manifested, that "this legal fiction should not operate. That choses "in action can have a situs away from the domicile "of the owner, for the purpose of taxation and for "other purposes, is frequently manifested in the "statutes of the State. In the Revised Statutes, as "amended by Chapter 176 of the Laws of 1851, it is "provided that every person shall be assessed in "the town or ward where he resides, when the as-"sessment is made, for all personal estate owned by "him, including all personal estate in his possession, "or under his control, as agent, &c , and this stat-"ute has been construed to authorize the assess-"ment of securities held by an agent in this State "for a non-resident owner."

The People *vs.* Trustees of Ogdensburgh, 48 N. Y., 390.

Williams *vs.* the Board of Supervisors, 78 *Id.*, 561.

Boardman *vs.* The Board of Supervisors, 85 *Id.*, 359.

"By Chapter 371, Laws of 1851, it is provided "that 'all debts owing by inhabitants of this State "'to persons not residing within the United States, "'for the purchase of any real estate, shall be "'deemed personal property within the town or "'county where the debtor resides, and as such shall "'be liable to taxation in the same manner, and to "'the same extent, as the personal estate of citizens "'of this State.'"

"That it was the legislative intent that such debts "for the purpose of taxation can have an existence "away from the domicile of the owner cannot be "questioned."

People *vs.* Trustees of Ogdensburgh, *supra.*

"By Chapter 37, Laws of 1855, all persons and "associations doing business in the State of New "York, as merchants, lenders or otherwise, and "non-residents of this State, shall be assessed and "taxed on all sums invested in any manner, the "same as if they were residents of this State."

"A foreign banker doing business in this State "may have his whole capital invested in securities, "and thus have nothing here but choses in action, "and yet the legal fiction that they exist at his "domicile must yield, and they are taxable here. "Under the laws of Congress and of this State, "regulating the taxation of stockholders of banks, "the shares of stock are not taxable at the domicile "of the owner, but at the place where the bank is "located, and thus again it is recognized that such "choses in action can have an existence, not at the "domicile of the owner."

See also Matter of Romaine, 127 N. Y.

In this case last cited the Court said:

"The fiction of the law that personal estate has "no *situs* away from the person or residence of "its owner is done away with, to a limited extent, "and for a specified purpose, and the truth is sub- "stituted in its stead as the rule of action. That "the Legislature had the power to do this can "hardly be questioned (Matter of McPherson, 104 "N. Y., 306).

"As was said by Judge Story when writing upon "this subject: 'A nation within whose territory "any personal property is actually situated has an "entire dominion over it while therein in point of "sovereignty and jurisdiction, as it has over im- "movable property situated there.'"

(Conflict of Laws, Sec. 550). In People *ex rel.* Hoyt *vs.* Commissioners of Taxes, 23 N. Y., 226, 228, Judge Comstock quotes with approval the fore- going extract, and adds: "I can think of no more

" just and appropriate exercise of the sovereignty " of a State or nation over property situated within " it, and protected by its laws, than to compel it to " contribute toward the maintenance of government " and law."

" *Accordingly, there seems to be no place for the " fiction of which we are speaking (mobilia per- " sonam sequuntur) in a well adjusted system of " taxation* (see also Guilland *vs.* Howell, 35 N. Y., " 657; Graham *vs.* First National Bank of Norfolk, " 95 *Id.*, 393, 601; Catlin *vs.* Hull, 21 Vermont, " 152)."

In the case of Catlin *vs.* Hull, *supra*, the Supreme Court of Vermont says:

" It is entirely just and equitable that if persons " residing abroad bring their property and invest it " in this State, for the purpose of deriving profit " from its use and enjoyment here, and thus avail " themselves of the benefit and advantage of our " laws for the protection of their property, their " property should yield its due proportion towards " the support of the Government which thus pro- " tects it."

II.

The money on deposit in the Trust Company was property subject to taxation under the act.

If we revert to the general jurisdiction of the State of New York for the purposes of taxation, we find it provided that " all lands and all personal es- " tate within this State, whether owned by indi- " viduals or corporations, shall be liable to taxa- " tion."

Sec. I., Title I., Chap. 13, Part I., R. S.

The definition of "personal estate" is given in the same statute, as follows:

"Terms 'personal estate' and 'personal property,' "whenever they occur in this chapter (p. 1, C. 13, "1 R. S.) shall be construed to include all household "furniture, *moneys*, goods, chattels, *debts due from* "*solvent debtors*, whether on account, contract, "note, bonds or mortgage, public stocks, and "stocks in moneyed corporations. They shall also "be construed to include such portion of the capital "of incorporated companies, liable to taxation on "their capital, as shall not be invested in real "estate."

Sec. 3, Title I., Chap. 13, Part I., R. S.

Such continued the statutory definition of personal property until the year 1892, when the Legislature passed Chapter 677, entitled "An Act relating to the construction of statutes constituting chapter one of the General Laws--the Statutory Construction Law, during the same session at which Chapter 399, Laws of 1892, was passed.

The relevant part of the text is as follows:

Sec. 1. * * * "This chapter shall be known "as the Statutory Construction law, and is appli- "cable to every statute unless its general object or "the context of the language construed, or other "provisions of law, indicate that a different mean- "ing or application was intended from that required "to be given by this chapter."

Sec. 2. "The term property includes real and per- "sonal property."

Sec. 3. "The term real property includes real "estate, lands, tenements and hereditaments, cor- "poreal and incorporeal."

Sec. 4. "The term personal property includes "chattels, *money, things in action* and all written

" instruments themselves, as distinguished from the " rights or interests to which they relate, by which " any right, interest, lien or incumbrance in, to or " upon property, or any debt or financial obligation " is created, acknowledged, evidenced, transferred, " discharged and defeated wholly or in part *and* " *everything,* except real property, *which may be* " *the subject of ownership.* The term chattels in- " cludes goods and chattels."

Thus we see that "*moneys*" were *inter alia* subjected to taxation under the statute prior to Chapter 677, Laws of 1892, and that in the act last referred to the term "property," as applicable to Chapter 399, declared "personal property" to be *inter alia* "*moneys*" and "*things in action.*"

The People *v.* Trustees of Village of Ogdensburgh, 48 N. Y., 397, the Court of Appeals refers to the provisions of the statute already cited (Sec. 1, Title 1, Chap. 13, Part I., R. S.), in connection with the fact that the relators had in their possession as agents of one George Parish, a resident of Bohemia, a large amount of household furniture, and also *six thousand dollars in money in bank*, and the Court says: "That the furniture in the mansion and *the money in bank* were, under these provisions, properly assessable to the relators is not seriously disputed."

The question of the taxation of deposits of money in bank has also come up in connection with the inheritance tax, and the Court of Appeals of the State of New York (Matter of Romaine, 127 N. Y., 88, and in the present Case), and it is of the opinion that the statute applies both in the letter and in spirit to cases *where deposits of this character are habitually kept within the State of New York*, and thus are afforded protection by the State Government, and that such deposits should be subject to their just proportion of the tax.

See also to the same effect:

Estate of Morejon, 5 N. Y. L. J., 864.
Estate of Boudon, 6 *Id.*, 1322.
Estate of Nicola Simoni, N. Y. L. J., Jan. 20, 1896.

The plaintiffs in error contended below that the relation between the decedent and the trust company was that of debtor and creditor, for the reason that the deposit became the property of the company and the company became indebted for the amount deposited, and such relation was a mere debt, citing the well-known case of State tax on foreign held bonds (15 Wal., 300) to the effect that debts have no situs independent of the domicile of the creditor.

This is repugnant to the laws of New York and the cases already cited, and it is respectfully urged that a wide distinction exists between the ambulatory characteristics of an ordinary debt represented by bonds (the subject matter of the case of the Foreign Held Bonds) or by a promissory note or other evidence of debt in the possession of the non-resident decedent before or at the time of his death, all of which are not within the State nor taxed by the State, and do not require the police protection of the State, and the deposit of money kept habitually and for nineteen (19) years as an investment with an interest paying trust company, a domestic State monetary institution which exacts all the continual safe guards of protection, civil, police and military that can surround it.

Thus the Legislature of New York in making a debt of a domestic corporation "personal property," expressly excepted a debt "evidenced by a bond, "promissory note or other instrument for the pay-"ment of money only, in terms negotiable or payable "to the bearer or holder."

Certainly the money deposited does not so absolutely become the property of the depositary as to disappear and have no ear marks of its owner. If such were the case, how could the Court of Appeals

of the State of New York say in People *v.* Trustees of Ogdensburgh (*supra*), that the money in bank was the money of George Parish and taxable?

If the money was held by the trust company as an investment by the decedent bearing regular interrest the company was to say the least, the agent of the decedent; the deposit was taxable in his lifetime and subject to the transfer tax on the assignment or transfer by the foreign administrator."

If the deposit be an obligation of the trust company then will the special provision of the taxing act (Sec. 9) apply: "If a foreign executor, administrator or trustee shall assign or transfer any stock or *obligations* in this State standing in the name of a decedent * * * the tax will be paid * * * on the transfer thereof."

That the State can separate the property from the owner and make any regulation as to location of property brought voluntarily within the State and kept there we have demonstrated by the authorities cited.

What would this money on deposit be worth were it not for the protection of the civil and the military power of the State? Is it not apparent that the intrinsic and ultimate value of the deposit rests on State authority? Did not a non-resident here voltarily submit himself to the authority of the State of New York? To the extent of the property brought by the non resident into the State of New York did he not become its presumptive citizen as to taxation in so far as his property—the *res*—was concerned? With the presence of the property from its arrival within the State, all the laws of the State of New York relating to the transfer of the property of the owner, living or dead, attached themselves to the property. Should the owner die the State of New York "appropriates for its own use a portion of the property at the moment of its owner's death and only allows the balance to pass (Matter Swift, 137 N. Y., 77).

In order to demonstrate that the money on de-

posit was not within the State, the plaintiff in error relied below on the cases of *in re* Phipps, 59 State Rep., 769, and of Kirtland *vs.* Hotchkiss, 100 U. S., 490, which are easily distinguished from the case at bar.

The matter of Phipps was the case of a non-resident entitled to a legacy in the estate of a resident of the State of New York. The Court said that the right to the legacy had never been reduced to possession and was kept within the State *without the will of the decedent, and hence* not subject to taxation; that Phipps had the right to claim the amount of money which his share of the residuary estate of Mrs. Fogg would result in – nothing more; no particular piece of property, no particular piece of money, no particular representatives of money or property; and that until such residuary estate was ascertained by an accounting of the executors, the legatee might not even be able to maintain an action for its recovery.

In the case at bar, however, the books of the decedent specifically show he brought tangible property here in the shape of money; they show his ownership of the sum of $71,715 deposited by himself in the trust company, and by him voluntarily permitted to remain in this State, invested with an interest paying depositary, a domestic corporation, and that it was within his power to remove the same at any time. For all intents and purposes it did not change its characteristics.

As to the case of Kirtland *vs.* Hotchkiss (100 U. S., 490), the question presented was whether the State could tax personal property of its citizen which was without the State of his domicile, and the Court arrived at the same conclusions as the Court of Appeals of the State of New York in the Matter of Swift, 137 N. Y., 77.

There was no confusion in the commingling by the decedent of the moneys on deposit in the trust company. Decedent created and opened the account himself individually. His own property was

ear marked by himself and distinguishable from the other money. His own books of account showed the deposits made and the exact amount of his own money among the deposits at the time of his death. In any event he held his own money in the account in trust for himself.

The administrator testified that the account was opened January 1, 1876, with the trust company by the decedent as trustee under the will of Edmund Husson; that from time to time he made deposit therein of funds belonging to the trust estate; that in such account also from time to time, as appears in the books of the decedent, he also made deposits of money belonging to himself individually; that at the time of the decedent's death the total amount of said deposits was $73,715, of which there appeared by his said books of account to have been deposited by decedent individually the sum of $71,715, leaving only $2,000 of the money belonging to the estate of Husson.

Here we see money voluntarily brought into this State by a non-resident and voluntarily permitted by him to remain in the State. There was no shadowy claim, no unascertained amount, no mere chose in action, no right to be reduced to possession, no necessity to have the fund administered upon by the administrator, but a particular sum of money, $71,715 shown by the books of the decedent to have been deposited and to be owned by him and on deposit with the trust company.

Nor was the money on deposit in the trust company transiently within the State. The account with the trust company, as testified by the administrator, was opened on or about the 1st day of January, 1876, and it will be noted that there is no evidence that the money of the decedent was only temporarily here, nor that it was here except as an investment. Nor does the administrator claim that the decedent had of his own money on deposit in the account when opened (Jan. 1, 1876), any sum less than the $71,715 of his own

money on deposit at the date of his death, May 21, 1895, and hence we must assume it as admitted that that amount had been kept continuously within the State during such period of time. It was voluntarily left by the decedent for safe keeping, and to gain the interest allowed by the trust company. The mere fact of depositing it in a trust company is evidence of seeking safety, if nothing else. But we can consistently consider the deposit a permanent investment as is the deposit in a savings bank. The administrator certainly has not proved the contrary. Nor has he shown that the pass books were without the State of New York.

As said by the Court of Appeals of the State of York in the Romaine case (127 N. Y., at p. 89): "Such property is within the State in every reasonable sense; receives the protection of its laws and has every advantage from the Government for the support of which taxes are levied, that it would have, had it belonged to a resident. We think a fair construction of the act permits no distinction as to such property, based simply upon the residence of the deceased owner."

Such moneys were not transiently here, as upon the person or in the baggage of a man suddenly dying within this State.

Matter of Enston, 113 N. Y., 182.
Matter of Romaine, 137 N. Y., 88.
Matter of Phipps, 59 St. Rep., 771.

The Court below appropriately said:

What were the rights of the decedent or those of his successors "as against the State of New York in "view of the command of its Legislature that all "property or interest in property within the State, "succeptible of ownership, should be subject to a "transfer tax upon the death of its owner, whether "he was a resident or non-resident? What was the "real thing, the essence of the transaction, which "gave rise to this controversy? The decedent

" brought his money into this State, deposited it in " a bank here, and left it here until it should suit " his convenience to come back and get it. While " the commingling of funds may complicate ad- " ministration. it did not change the facts as thus " stated. If he had deposited in specie, to be re- " turned in specie, there could be no doubt that the " money would be property in this State subject to " taxation. But, instead, he did as business men " generally do, deposited his money in the usual " way, knowing that not the same but the equi- " valent would be returned on demand. While the " relation of debtor and creditor technically existed, " practically he had his money in the bank and " could come and get it when he wanted it. It was " an investment in this State subject to attach- " ment by creditor."

Plimpton *v.* Bigelow, 93 N. Y., 592, 596, 600.

N. Y. Code Civ. Pro., Secs. 648, 2478.

Naser *v.* First Nat. Bk., 36 Hun, 343.

Salter *v.* Weiner, 6 Abb., 191, Clerke, *J.*

Greentree *v.* Rosenstock, 61 N. Y., 583.

Duncan *v.* Berlin, 60 N. Y., 151; 98 N. Y., 87.

" If not voluntarily repaid he could compel pay- " ment through the Courts of this State. The de- " positary was a resident corporation, and the re- " ceiving and retaining of the money were corporate " acts in this State. Its repayment would be a " corporate act in this State. Every right springing " from the deposit was created by the laws of this " State. Every act out of which those rights arise " was done in this State. To enforce those rights it " would have been necessary for the decedent to " come into the State. Conceding that the deposit " was a debt; conceding that it was tangible, still " it was property in the State of New York for all

" practical purposes and in every sense it was
" within the meaning of its Transfer Tax Acts.
" *In re* Romaine, 127 N. Y., 80, 89.
" Also see cases *supra.*

" While distribution of the fund belongs to the
" State where the decedent was domiciled, as such
" distribution cannot be made until his adminis-
" trator has come into this State to get the fund,
" possibly after resorting to the courts for aid in
" reducing it to possession, the fund had a *situs*
" here, because it is subject to our laws. A reason-
" able test in all cases as it seems to me is this:

" Where the right, whatever it may be, has a money
" value and can be owned and transferred, but can-
" not be enforced or converted into money against
" the will of the persons owning the right without
" coming into this State, it is property within this
" State for the purposes of a succession tax. Thus the
" right in question is property, because it is capable
" of being owned and transferred. It is within this
" State, because the owner must come here to get
" it. It is subject to taxation, because it is under
" the control of the laws of the State of New York.
" It has a money value, because it is virtually money
" or can be converted into money upon demand. It
" is subject to a transfer tax, because the passing
" by gift or inheritance of 'all property or interest
" therein whether within or without this State,
" over which this State has any jurisdiction for the
" purpose of taxation,' comes within the express in-
" tention of the Legislature of the State of New
" York."

It has been held in different States that money, while a mere medium of exchange, is, so far as taxation questions are concerned, a form of tangible personal property.

Thus it was held in

Provident Inst. *v* Massachusetts, 6 Wall. (U. S.), 611,

that "the sums received from depositors are deposited within a law imposing a tax upon deposits, whether they have been invested or not, and without reference to their value as compared with any other standard." To the same effect

Cammell *v.* Riviere (Tex., 1893), 22 S. W. Rep., 993.

Campbell *v.* Wiggins, 2 Tex. Civ. App., 1.

State *v.* Earle, 1 Nev., 397.

McCutchen *v.* Rice County, 2 McCrary (U. S.), 337.

Liverpool Ins. Co. *v.* Board, 44 La. Ann., 91.

Matter of McMahon, 66 How. Pr. (N. Y.), 190.

Also cases cited—

Amer. & Eng. Ency. of Law, 25, 200; p. 104, Notes 1, 2 & 3.

III.

The tax imposed under the Taxing Act of the State of New York in question is not repugnant to the fifth amendment of the Constitution of the United States.

The question of the constitutionality of the taxing act was tested in the Matter of McPherson (104 N. Y., 306), in which case the Court of Appeals of the State of New York held the act known as Chapter 483, Laws of 1885, which became incorporated in the present taxing act, was not violative of the State Constitution, and further that it provided "sufficiently for a notice and hearing or opportunity

to be heard," and so does not invade the constitutional right to "due process of law."

See also Weston *v.* Goodrich, 86 Hun, 194.

The same Court in the Matter of Sherwell, 125 N. Y., 379, held that the Legislature is not restricted in the selection of its subjects for the raising of revenue for State uses. In such respects it is sovereign and is without other control than the restriction found in the fundamental law of the State.

A law providing for the taxation of the capital of a non-resident is constitutional.

Duer *v.* Small, 4 Blatchf. (U. S.), 263.

International L. Assurance Co. *v.* Com'rs of Taxation, 28 Barb., N. Y., 318.

See also cases cited Amer. & Eng. Ency. of Law, 25 Taxation, p. 104, notes 1, 2 & 3.

IV.

The tax imposed by the State of New York under its taxing act complained of by the plaintiffs in error was so imposed with due process of law.

Taxation exacts money from individuals as their share of a justly imposed and apportioned public burden while property is taken by the exercise of the right of eminent domain, not as the owner's share of the public property, but as something distinct from and beyond his share, special compensation being required to be made in the latter case because the Government is a debtor for the property so taken, but not in the former because the payment of taxes is a duty which creates no obligation

to repay otherwise than in the proper application of the tax. Constitutionul requirements that provide property shall not be taken for public use without just compensation have reference solely to the exercise of eminent domain.

White *v.* People, 94 Ill., 609.
Hessler *v.* Drainage Com'rs, 53 Ill., 105.
Booth *v.* Woodbury, 32 Conn., 118.
Nicholas *v.* Bridgeport, 23 Conn., 189.
Logansport *v.* Seybold, 59 Ind., 225.
Warren *v.* Henly, 31 Iowa, 31.
Stewart *v.* Polk County, 30 Iowa, 9.
Martin *v.* Dix, 52 Miss., 53; 24 Am. Rep., 661.
People *v.* Brooklyn, 4 N. Y., 419; 55 Am. Dec., 266.
Kittle *v.* Shirvin, 11 Neb., 81.
Hanscom *v.* Omaha, 11 Neb., 37.
Allen *v.* Drew, 44 Vt., 175.
Gillman *v.* Sheboygan, 2 Black (U. S.), 510.

The record shows conclusively that the plaintiffs in error appeared by attorney before the appraiser, and in each subsequent stage of the proceedings of the State of New York.

See pp. 6, 11, 12, 13 and 18 of the printed record.

In conclusion, it is respectfully submitted:

I.—That the highest Court of the State of New York has adjudged the act known originally as the Collateral Inheritance Tax Act (Chap. 483 of the Laws of 1885), and which was subsequently embodied in the Transfer Tax Act (Chap 399, Laws of 1892), to be constitutional.

II.—That although plaintiffs in error duly appeared in the proceeding initiated in the office of the Surrogate of the County of New York

to appraise the property of the decedent subject to the tax, no question of constitutionality was presented to the Surrogate of the County of New York or to the courts of appellate jurisdiction by the plaintiffs in error.

III.—That as shown by the cases cited, there is nothing repugnant to the Constitution of the United States in the imposition of the tax under the Transfer Tax Act of the State of New York in question.

IV.—That as shown by the record the plaintiffs in error have had ample opportunity to be heard, have voluntarily appeared by counsel in the proceedings below, and that the tax imposed and paid by plaintiffs in error was fixed and determined by due process of law.

V.—That the moneys of the decedent were property on deposit in the State of New York, and subject to the provisions of the taxing act.

For these reasons the writ should be dismissed, with costs.

Respectfully submitted,

EMMET R. OLCOTT.
Attorney and of Counsel for the Comptroller of the City of New York, Defendant in Error and Appellee.

SCUDDER *v.* COMPTROLLER OF NEW YORK.

ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

No. 55. Argued October 18, 1899. — Decided October 30, 1899.

A judgment of the highest court of a State, upholding the validity of a tax assessed under a statute of the State, upon money deposited with a trust company in the State by a resident of another State, cannot be reviewed by this court on writ of error upon the ground that the proceedings were repugnant to the Constitution of the United States, when no such ground appears to have been taken by the plaintiff in error, or considered by any court of the State, before the final judgment.

THE case is stated in the opinion.

Mr. J. Culbert Palmer for plaintiff in error.

Mr. Emmet R. Olcott for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a proceeding commenced September 27, 1895, in the surrogate's court, by the comptroller of the city and county of New York, for the taxation of property of John F. Houdayer, deceased, under the statute of New York of 1892, c. 399, entitled "An act in relation to taxable transfers of property," the material provisions of which were as follows:

"SEC. 1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

"1. When the transfer is by will, or by the intestate laws of this State, from any person dying seized or possessed of the property while a resident of the State.

"2. When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death."

"SEC. 22. The words 'estate' and 'property,' as used in this act, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this act, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this State, over which this State has any jurisdiction for the purpose of taxation. The word 'transfer,' as used in this act, shall be taken to include the passing of property, or any interest therein, in possession or enjoyment,

present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed." 1 Laws of New York of 1892, pp. 814, 815, 822.

The case, as stated by the Court of Appeals, was this: "On May 21, 1895, John F. Houdayer died intestate at Trenton, New Jersey, where he had resided for a number of years. In 1876 he opened an account with the Farmers' Loan and Trust Company of the city of New York as trustee under the will of Edward Husson, deceased, in which he made deposits from time to time of moneys belonging to the trust estate, as well as moneys belonging to himself. This continued as an open running account until his death, when the balance on hand was the sum of $73,715, of which $2000 belonged to him as trustee, and the remainder to himself as individual. The appraiser deducted $3500 for the payment of debts and expenses, and included $68,215 in the appraisal, which was affirmed by the surrogate, but reversed by the Supreme Court." 150 N. Y. 37; 3 N. Y. App. Div. 474.

On October 6, 1896, the Court of Appeals reversed the order of the Supreme Court, and affirmed the order of the surrogate.

On April 4, 1898, the administrator of Houdayer sued out a writ of error from this court, as against the comptroller, and assigned the following errors:

"First. That the property in question being situated in the State of New Jersey, of which State also the decedent was a resident at the time of his decease, the laws of the State of New York have no application thereto, nor have the courts of New York jurisdiction thereof.

"Second. That by the law, as interpreted by the decision and judgment herein, the legislature of the State of New York attempts to exercise jurisdiction beyond the State, and to affect contracts and rights of a citizen of another State, which are protected by the Constitution and laws of the United States and the judicial power granted to its courts, and violates and interferes with the sovereignty of the State of New Jersey.

"Third. That the act of the legislature of the State of New

York, herein referred to, as applied to the facts and circumstances of this case, or the act done under the authority of the State of New York here complained of, is unconstitutional and void as being repugnant to section 10 of article 1 of the Constitution of the United States, in that it impairs the obligation of the contract between a non-resident depositor and the Farmers' Loan and Trust Company of New York.

"Fourth. That the said act of the legislature, as interpreted by the decision herein, is repugnant to the Fifth Amendment of the Constitution of the United States, which provides that private property shall not be taken for a public use without just compensation.

"Fifth. That the said act of the legislature, as interpreted by the decision herein, is repugnant to section 1 of the Fourteenth Amendment of the Constitution of the United States, by which States are forbidden to deprive citizens of life, liberty or property without due process of law."

But the difficulty which lies at the threshold of the consideration of this writ of error is that none of the points taken in the assignment of errors appear by the record to have been made in any of the courts of the State.

The only statements of the grounds of the administrator's objections to the proceedings below are these two: 1st. His affidavit filed before the appraiser appointed by the surrogate, averring "that he objects to such proceedings, and opposes a levy of any such tax upon such amount so on deposit, and claims that said deposit is exempt under the laws and not subject to taxation." 2d. His appeal to the surrogate from the formal order of assessment, taken "on the ground that the deposit in the Farmers' Loan and Trust Company of $71,715, standing at the time of the decedent's death in his name as trustee, was a chose in action belonging to a non-resident decedent, and not property within this State subject to taxation under the provisions of the act in relation to taxable transfers of property; that the situs of the claim of the decedent against such deposit was at the domicil of the decedent, and not at the domicil of the said depository, and such property being the property of a non-resident decedent,

and situated out of this State, the same does not fall within the purview of said act."

Both these statements clearly refer to the laws of New York, and not to the Constitution of the United States. And the opinion of the Supreme Court, as well as that of the Court of Appeals, turns upon the question whether the sum due from the Farmers' Loan and Trust Company of the city of New York to the intestate at the time of his death was "property within the State," within the meaning of the statute of 1892.

No mention of the Constitution of the United States, or of any provision thereof, by the plaintiff in error, or by the court, is to be found at any stage of the case while it was pending in the courts of the State of New York; and it is impossible, upon this record, to avoid the conclusion that it never occurred to the plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest court of the State.

In order to give this court jurisdiction of a writ of error to review a judgment which the highest court of a State has rendered in favor of the validity of a statute of or an authority exercised under a State, the validity of the statute or authority must have been "drawn in question" "on the ground of their being repugnant to the Constitution, laws or treaties of the United States." When no such ground has been presented to or considered by the courts of the State, it cannot be said that those courts have disregarded the Constitution of the United States, and this court has no jurisdiction. Rev. Stat. § 709; *Murdock* v. *Memphis*, 20 Wall. 590, 633, 634; *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175; *Miller* v. *Cornwall Railroad*, 168 U. S. 131; *Columbia Water Power Co.* v. *Columbia Railway*, 172 U. S. 475, 488, and cases there cited.

Writ of error dismissed for want of jurisdiction.